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Supreme Court, U.S.
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NO.

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IN THE

Supreme Court of the United States

David L. Hale,
Petitioner

v.

State of Arkansas,
Respondent

On Petition For Writ of Certiorari
To The Arkansas Supreme Court

PETITION FOR WRIT OF CERTIORARI

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114 pp

QUESTIONS PRESENTED FOR REVIEW

BRIEF FACTUAL STATEMENT FOR PURPOSES OF CLARIFYING QUESTIONS PRESENTED

David L. Hale is a former municipal judge and Democratic party leader in Little Rock, Arkansas, who was the key Federal immunized witness in the so-called "Whitewater investigation". Hale owned a federally licensed 501(C)(3) SBIC, Capital-Management Services Inc. ("CMS") In 1993, CMS and Hale came under investigation by the United States Atttorney's office regarding a scheme of loans with Madison Guaranty Savings and Loan Association, CMS, and high Democratic office holders. As a result United States Attorney General, Janet Reno, found specific credible evidence that the President of the United States, William Jefferson Clinton, was part of these misdeeds. On January 20, 1994, Attorney General Reno appointed Robert Fiske as an Independent Council to investigate the "Whitewater case" as it came to be called. See 28 CFR 603.1 Fiske granted Hale immunity in a document signed by all parties on March 19, 1994. The agreement appears to immunize Hale from all criminal conduct related to CMS, Madison Guaranty Savings and Loan, et al., whether in the Federal or State sphere.

A state Democratic office holder, Lee Douglas, appointed by former Governor Bill Clinton and reappointed by then-Governor Jim Guy Tucker subsequently referred criminal charges against Hale for allegedly making a false or misleading statement relating to a life insurance company that had been purchased in the scheme of loans with Madison Guaranty, CMS et al. Petitioner was tried and convicted on these state charges despite his immunity agreement with the United States.

It is undisputed by any party or authority that David L. Hale fully complied with the terms of the Federal immunity agreement.

1. Whether a defendant who enters an immunity agreement with an Independent Counsel that is approved by a Federal Court that promised immunity from prosecution for "any crime" that he reveals connected to a specific ongoing investigation, can, after fully complying with the said agreement and testifying openly and truthfully in Federal Court, rely upon such a grant of immunity as regards to State offenses derived from the immune course of conduct where the express language of the said agreement indicates that the immunity is transactional.

2. Whether the Federal government can pre-empt State criminal prosecution when an Independent Counsel is specifically authorized by the Attorney General of the United States and by Act of Congress, authority to fully investigate, to prosecute all crimes growing out of a specific investigation into a criminal course of dealing, or to grant immunity from prosecution in a given, specific investigation, to wit, the Madison-Guaranty/Whitewater Investment Corp/Capital Management Services case, 28 CFR §603.1

3. Whether a State can use a plea of guilty to two (2) Federal felony counts entered in United States District Court as convictions to support an enhancement of sentence under a State habitual criminal statute when such Federal plea was entered as part and parcel of an immunity agreement with the United States regarding an investigation of the same course of criminal conduct.

4. Whether a Federally immunized witness who receives only use and derivative use immunity, may be cross-examined at trial with the use of immunized testimony.

5. Whether a Federally immunized witness is required to make a contemporaneous objection under the holding of Kastigar v. United States, 406 US 441 (1972) or may make objection

at any time "before, during, or after" the proceedings.

6. Whether Kastigar requires some sort of "firewall" procedure to be instituted so that the State does not have any exposure to testimony given under immunity in Federal Court when it prosecutes a Federally immunized witness on State charges.

7. Whether Kastigar requires the State to prove that no agent or person connected with the prosecution of a state criminal case against a Federally immunized witness has been exposed in any particular to the immunized testimony.

8. Whether a State appellate court, under the Sixth and Fourteenth Amendments of the United States Constitution, is required to adhere to the "plain error" doctrine in order to assure fundamental fairness in a trial.

9. Whether the use by the prosecution of a video taped deposition for a key witness is a violation of the Sixth Amendment of the Constitution where there is no other special consideration of tender age or sensibility of the witness and where the witness can admittedly be brought to testify if the accused is willing to pay for the said witness's travel.

10. Whether the proper standard of review under the Fourteenth Amendment of the Constitution of the United States of substantial evidence questions in criminal cases is the "rational finder of fact test" of Jackson v. Virginia, 443 US 307 (1979) or whether a State appellate court is free to ignore Jackson and free to use the "some evidence" test in prosecutions not involving a Federal habeas corpus remand.

11. Whether a criminal defendant may effectively be denied the right to present a witness by virtue of the fact that the State has already given such witness immunity from prosecution

but does not call the witness at trial nor grant immunity for defense testimony, thus defeating the accused's Sixth Amendment right to produce witnesses favorable to his cause.

12. Whether a criminal defendant can require an otherwised immunized witness to testify in his case under the Sixth Amendment.

13. Whether under the Sixth and Fourteenth Amendment errors may so accumulate as to deny an accused defendant the right of a fair and impartial trial, and how such threshold may be determined.

LISTING OF PARTIES TO PROCEEDING

All parties are noted on the cover of this petition.

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BASES FOR JURISDICTION

a. Date of Judgement or order sought to be overturned: December 7, 2000 (final)
b. Date of Order relating to rehearing: January 18, 2001
c. Rule 12.5 statement: Not applicable
d. 28 USC §1257
e. Rule 29.4 b notification: Not applicable

CONSTITUTIONAL PROVISIONS, TREATIES, AND STATUTES AT ISSUE

(Citations only. Complete text is in appendix.)

United States Constitution, Article 6, Section 2
United States Constitution, Amendment 5
United States Constitution, Amendment 6
United States Constitution, Amendment 14

Ark. Code Ann §5-1-112 (Repl 1991)
Ark. Code Ann §5-2-203
Ark. Code Ann §5-2-402
Ark. Code Ann § 23-60-109

28 CFR § 603.1

28 USC § 592
28 USC § 593

28 USC § 594
18 USC § 6002

STATEMENT OF THE CASE

Petitioner, David L. Hale, is a former municipal judge and Democratic Party leader in Little Rock, Arkansas, who was the key Federal immunized witness in the so-called "Whitewater Investigation". Hale was charged under Ark Code Ann §23-60-109, a statute making it a felony to provide false or misleading information to the Insurance Department and which statute had been on the books for a period in excess of 40 years but never had been used in any reported case except his. He was ultimately convicted and the State sought enhancement of sentence under Arkansas' habitual felon statute, based upon Hale's having pled guilty to two (2) counts in Federal court as part of his immunity agreement with the Whitewater prosecutors. The state felony conviction was wrongfully obtained and for reasons that will appear below, he petitions that this conviction and the sentence imposed be set aside.

The matters at issue began in 1986. Petitioner owned a Federally licensed "small business investment company" ("SBIC"), Capital-Mangement Services, Inc. ("CMS"). It was licensed to provide financing for small disadvantaged businesses. Among a scheme of loans with Madison Guaranty Savings and Loan Association, ("Madison") CMS and high Democratic office holders, Petitioner and his associates purchased controlling interest in a small life insurance company, National Savings Life Insurance Company ("NSLIC"). He hired Joseph Niemann, a professional in the insurance industry with some thirty years of experience, to run the company for him. At no time did any policy holder lose any money as a result of Petitioner's and Niemann's operation of the company.

NSLIC received a letter dated March 17, 1993 from the Arkansas Insurance Department advising of a $38,757 deficiency in the required statutory reserve funds of the company. NSLIC was given thirty (30) days in which to correct the situation. Subsequently an additional extension of ninety (90) days was given.

At about this same time, Petitioner entered a series of disputed transactions with one George Michael Rutherford of Houston, Texas. As a result of these transactions, on or about July

2, 1993, Rutherford caused to be issued a $150,000 cashier's check drawn on one of Rutherford's companies, Inkjet, Inc., and made payable to Emanon Marketing, Inc., the General Agent for NSLIC. The State's position was that through a series of transactions the Petitioner had caused the $150,000 to be put into an account of NSLIC long enough to indicate that the deficiency had been alleviated. Petitioner was then said to have caused Joseph Niemann, the President of NSLIC by way of letter dated July 6, 1993, and posted through the United States mail to report to the Commissioner that the deficiency had been corrected. Rutherford was said to have demanded his money back. Petitioner, according to the State's version, complied with this request having accomplished his goal of "cooking the books".

Hale, for his part, presented evidence that the $150,000 exchanged hands as a part of a written stock purchase between NSLIC and Financial Services of Arkansas Inc. ("FSA") which Rutherford owned. Joseph Niemann's testified that he had executed a written stock purchase agreement between NSLIC and FSA on June 27, 1993. Niemann's testimony was that he compiled, wrote, executed, and mailed the offending letter dated July 6, 1993, to the Arkansas Insurance Department without any recollection as to whether Hale had knowledge of the letter. Niemann's testimony was that it was his decision and acts as to how the money was moved through the series of transactions that were brought out at trial. At no time while Petitioner and Niemann were running the company did any policy holder lose any money nor were there any just claims which were not paid in full.

In August of 1993, Joseph Niemann, after learning of Petitioner's pending Federal indictment, but before the indictment was actually handed down on September 23, 1993, began seeking employment with the Arkansas Insurance Department. On September 21, 1993, Niemann also wrote a letter to Lee Douglass, the Arkansas Insurance Commissioner (and hand carried it to the Arkansas Insurance Department) opining that the deficiency of NSLIC of March, 1993, had not been cured inasmuch as the assets purchased with the $150,000 were "not admitted", an insurance industry term of art meaning, roughly, "these assets don't count" in figuring the required reserves.

On September 23, 1993, Petitioner was indicted by a grand jury called together for the investigation of CMS by the United States Attorney for the Eastern District of Arkansas. The indictments alleged irregularities in the CMS loans. Documents and statements made public indicated that Hale was not alone in the criminal activity and that many high Democratic office holders and operatives, including, but not limited to then-Governor Jim Guy Tucker, First Lady Hillary Clinton and then-President of the United States, William Jefferson Clinton, were involved in these matters.

After an investigation by then-Attorney General of the United States, Janet Reno, of Hale's documents and statements, Reno found there to be specific credible evidence of the involvement of the President of the United States to warrant the appointment of an Independent Counsel. On 20 January 1994 Reno appointed Independent Counsel Robert Fiske, who was given full authority to investigate the "Madison Guaranty-Whitewater Development Corporation-Capital Management Services" case (popularly known as the "Whitewater" investigation.) See 28 CFR 603.1.

Fiske struck an immunity agreement with Petitioner. Petitioner agreed to plead guilty to two (2) Federal counts, mail fraud and conspiracy, and was sentenced to 28 months in Federal prison, ultimately serving 19 months. He further agreed to cooperate with the Whitewater investigation and to testify truthfully to all matters, whenever and wherever required. He was extensively debriefed by the FBI and the staff of the Office of Independent Counsel ("OIC") regarding all matters–including NSLIC–in early March, 1994.

Ultimately he testified both before the Federal grand jury in Little Rock regarding CMS, Madison and Whitewater and at the trial of Jim McDougal, Susan McDougal and Jim Guy Tucker. Petitioner's assistance to the Federal government resulted in verdicts against the McDougals and Tucker, as well as a guilty plea by Webster Hubbell, who was at the time the number three (3) man in the United States Department of Justice. Hale's assistance also ultimately resulted in guilty pleas in a number of lesser known individuals, the removal from office of Governor Tucker, and State disbarment proceedings against numerous members of the Arkansas political family. At no point in the entire history of this matter has any person or authority indicated that Petitioner did not fully live up to his end of the bargain or gave less than his full cooperation.

It was explained to Petitioner by Independent Counsel Fiske and his subordinates that, if he chose to make the deal and to testify, Hale would be divesting himself of his Fifth and Sixth Amendment rights and in consideration would receive a grant of immunity. By a letter agreement dated March 19, 1994, and signed by all parties, Petitioner was granted immunity. The language of the Fiske agreement states in the pertinent part:

> "If David L. Hale fully complies with the understandings specified in this Agreement, he will not be further prosecuted for any crimes related to his participation in the conduct of the affairs of Capital Management Services, Inc, Diversified Capital, and Madison Guaranty Savings and Loan, and any other crimes to the extent that David L. Hale has disclosed such criminal activity to this office as of the date of this agreement"
>
> (R. 182,)

As Petitioner was preparing to testify at the Tucker-McDougal trial, he received word that he was going to be charged with the insurance violation at issue herein, by criminal information by the then-Prosecuting Attorney for the Sixth Judicial District, Mark Stodola. Stodola was, at the time, a Democratic candidate for the United States Congress from the Second Congressional district. No state charges were brought against any other Whitewater figure by either Mr. Stodola or his successor in office, Larry Jegley.

Hale then gave his testimony at the Tucker-McDougal trial in April, 1996. On July 2, 1996, the very last day of the applicable statute of limitations, he was charged by the State prosecutor. The recommendation for such charge had been made by Lee Douglass the

Commissioner of Insurance and carried out by Prosecutor Stodola despite the objection of Independent Counsel Kenneth Starr, who had succeeded Mr. Fiske. Starr and his ethics officer, former Watergate Committee Chief Counsel Samuel Dash, held a meeting with Stodola and his staff without the knowledge of Petitioner or his attorney. At that meeting, Starr reportedly invited Stodola to address the uncharged conduct related to NSLIC at Petitioner's Federal sentencing. Stodola refused such participation.

Thereafter, Petitioner moved to dismiss the criminal information, citing the said agreement , the Supremacy Clause of Article VI , Section 2 of the Constitution of the United States, 28 USC §§591 and 594(A), and various other Federal authorities. (Interlocutory R. 179-184) This motion was denied. The trial Court concluded that there was no grant of transactional immunity that was binding upon the Courts of Arkansas, but did acknowledge that the document created a "use or derivative use" immunity. A hearing pursuant to the holding in Kastigar v. United States, 406 US 441 (1972) and 18 USC §6002 et seq was held at Petitioner's request. (R. 299) While agreeing that Kastigar put the burden on the State to prove no use or derivative use of immunized testimony, the Circuit Court refused to require a line-by-line "pre-trial trial" of the State's evidence as was required by the holding in U.S. v. North, 285 U.S. App D.C. 343, 910 F2d 843 *aff'd in the relevant part* 297 U.S. App D.C., 146, 920 F2d 940 (1990) *cert den* 941 (R. 634) and its progeny.

It was clear from the testimony at the Kastigar hearing that the Prosecuting Attorney took no steps to shield his people from the immunized testimony given by Petitioner either at the Federal trial or before the Federal grand jury. The prosecutor freely and openly admitted that his own criminal investigative file on Hale contained the entire 1600 plus pages of Petitioner's immunized testimony given at trial. (More than this, subsequent investigation showed that the officers of the Little Rock Police Department who had compiled the investigative file given to the Prosecutor also contained excerpts of Hale's immunized Federal grand jury testimony.)

Lee Douglass, Arkansas State Insurance Commissioner, testified that his staff had contact with officials of the Small Business

Administration concerning NSLIC, but didn't "think" they had shared any information. According to Captain Sam Williams of the Little Rock Police Department, he felt it was necessary to seek permission from the FBI working with the Independent Counsel as to which witnesses they might interview in the State's case. The testimony of former-prosecutor Stodola clearly indicated extensive contacts with the Office of Independent Counsel and others concerned with the Federal case.

Out of over forty deputy prosecutors, the original deputy prosecutor assigned by Stodola to put together the criminal information and to investigate the case was one John Ray White, the son-in-law of one Sam Winstead. Winstead had been finance chairman for and a close personal friend of Governor Jim Guy Tucker. Tucker was, in turn, one of the persons convicted and removed from office based on the testimony of Petitioner.

White candidly admitted discussing the Tucker trial with his father-in-law, Winstead. White also admitted that Winstead had attended the Tucker trial faithfully every day. (R. 764-765) White, however, professed not to remember for sure whether he had discussed Hale's immunized testimony with Winstead.

Deputy State Prosecutor White ultimately left the prosecutor's office and was replaced on the case by Deputy Prosecutor Hugh Finkelstein. Finkelstein had left the law firm of McArthur & Finkelstein to take the job with the prosecutor's office. Petitioner objected that this was a conflict because Blake Hendricks, another attorney associated with the McArthur firm, who utilized the same office, same stationery, same support staff and same telephone number, was listed on McArthur & Finkelstein letterhead as being "of counsel" to this firm.

Hendricks represented Michael Rutherford and FSA in their problems with Commissioner Douglass and also negotiated an immunity agreement for Rutherford and his partner, Rebecca Winemiller, for any testimony they might give in the instant case. Indeed, Hendricks ultimately appeared at the trial of this matter to assert Winemiller's Fifth Amendment rights. Although FSA, Rutherford and Winemiller, had been under active State investigation for various criminal violations of the laws of Arkansas. Once they had agreed to testify against David L. Hale, neither Winemiller nor Rutherford had any further problems with State prosecution outside their state immunity agreements.

Based on these facts and others in the record, Petitioner moved that the charges be dismissed. This motion was denied and Petitioner decided to go forward to trial rather than seek a Writ of Prohibition from the Arkansas Supreme Court.

Trial was set for April 22, 1998. Voir dire was completed and a jury sworn in that day. Trial proper was to begin the next morning. Rutherford, a key prosecution witness, had allegedly been flown in by the prosecutor from Tanzania, where he was said to be working.

During the early morning hours of April 23, 1998, Hale suffered a recurrent, life-threatening cardiac arrhythmia and required hospitalization.

The State demanded proof of Petitioner's illness and the trial Court required the doctors treating Petitioner to meet with the Prosecutor and to give him a statement of Hale's condition. Only then did the trial Court conclude that Petitioner's health problems were legitimate. The Court postponed the trial for a week and asked each of the jurors, individually, if they could come back and if they could stay untainted by information from outside the court room. All averred that they could.

When the trial court reconvened, Petitioner was not yet out of the hospital but was expected out in a day or two. Counsel for Petitioner requested holding the same jury for that time and going forward with the trial. However, Rutherford made an uncorroborated claim of conflicting business obligations that he would miss if he had to attend trial then. For this reason, the trial Court, over Petitioner's objection and demand for proof of such obligations, reset the trial at the State's convenience in July. A mistrial was granted and the jury was dismissed on grounds of "manifest necessity". The State subsequently filed a motion to force a deposition, or in the alternative, to have Petitioner pay the travel expenses of Rutherford from Africa for another trial. (R. 981-985.

See also R. 1077-1078)

An interlocutory appeal of the ruling rescheduling the trial on Fifth Amendment former jeopardy grounds, as well as on the Kastigar issues was pursued to the Arkansas Supreme Court. The requested relief was denied as the Arkansas Supreme Court found that "manifest necessity" did, in fact, exist and that the State was not bound by the immunity agreement, not having been a party to same and that no Federal preemption existed. The Arkansas Supreme Court did sternly charge both the State and the lower Court that any Kastigar-prohibited use of the immunized testimony was forbidden. See Hale v. State, 336 Ark. 345 , 985 S.W.2d 303(1999) (Hale I)

While the interlocutory appeal was pending, proceedings below were stayed except that, Rutherford, having returned on July 17, 1998, recorded his deposition by video tape. Petitioner served notice upon the prosecutor that he did not believe the procedure to be valid under either Federal or State law. Motions to exclude the video tape at trial on both Sixth Amendment grounds and on hearsay grounds were denied. As to the latter, the State produced an affidavit of unavailability stating that Rutherford would not be available in "the near or distant future". Petitioner objected to all of this on Sixth and Fourteenth Amendment grounds and the absence of any evidence to support the affidavit. (R. 1158-1165)

Between the time of the deposition and the date of trial, the aforementioned discovery of Hale's Federal Grand Jury testimony in the Little Rock police files, previously not surrendered in discovery, was made and objected to. Such objection was overruled.

The State jury trial was rescheduled for March 23-25, 1999. At the said trial, Joseph Niemann, President of NSLIC, the only witness who could testify as to whether Hale had caused him to write the letter, testified that he could not remember for sure whose idea it had been to write the offending letter and that he did not know whether Petitioner ever even saw the letter. Niemann admitted writing and posting the letter himself. This testimony was never seriously contested. He stated that when he told Petitioner about his qualms regarding the stock purchase, Petitioner told him to do whatever he had to do as far as contacting the Commissioner of

Insurance.

Rutherford's videotaped deposition, admitted over objection, stated that he did not enter into a stock purchase agreement but rather was attempting to purchase a CMS owned or recommended company, Med-a-Corp, which he said he refused to do and had demanded his money back, on or about July 6, 1993. Rutherford stated that he felt that Hale had been duped by those running Med-a-Corp.

However, records of FSA relating to Workers' Compensation matters, which were admitted during Petitioner's case in chief, showed this explanation to be untrue. Sworn documents submitted to the Arkansas Workers' Compensation Commission by Rebecca Winemiller, Rutherford's partner in FSA, showed FSA continued to represent ownership of Med-a-Corp and $150,000 from the sale of stock of FSA, Inc. to NSLIC, as assets in their application for self-insurer status, up until the time the said application was withdrawn in September, 1993. Moreover, an outside, independent audit ordered by the Insurance Commissioner, Lee Douglass, completed in December 1993, showed a purchase of shares of FSA by NSLIC, an event which Rutherford had denied had ever happened.

Petitioner attempted to introduce evidence through Rebecca Winemiller, Rutherford's partner, but both Rutherford and Winemiller had been previously granted immunity from prosecution. The State chose not to use Winemiller, whom Petitioner called as his witness. Outside the hearing of the jury, Winemiller took the Fifth Amendment, refusing to admit or deny that the sworn statement she had given, and upon which the State relied upon to charge Hale, was truthful. The Court refused to order her to testify, stating that grants of immunity inure only to the benefit of the State.

Finally, Hale took the stand in his own defense. Despite the warning of the Arkansas Supreme Court, Deputy Prosecutor Finkelstein cross-examined him utilizing the immunized testimony that Petitioner had given at trial of the McDougal case. Finkelstein both formulated questions from the Federal immunized testimony and used the Federal immunized testimony for purposes of refreshing recollection and impeachment.

One transaction in the various CMS activities in the Federal Trial immunized testimony involved a series of transactions with an account with Prudential Bache. Prosecutor questions about this seemed to emphasize the resemblance to the State's theory about this case. An objection was interposed after several questions along this line had been asked. Petitioner moved for a mistrial and pointed out to the trial court (and to the Arkansas Supreme Court on subsequent appeal) that a contemporaneous objection is not needed where the issues fall under the ambit of the Kastigar doctrine. Both the motion for mistrial and for an admonition to the jury was overruled. The trial Court instructed the State not to belabor the point "too much longer" in the States's use of the Federal immunized testimony. The State also argued on closing that the matter at hand was "just like" the Prudential Bache account situation under the CMS investigation.

Petitioner appealed these matters and also raised the issue of the proper standard of review before the Arkansas Supreme Court on substantial evidence questions. The Arkansas Supreme Court uses something very much like the "some evidence" test that was at issue Jackson v. Virginia, 442 US 307 (1979), having stated that Jackson has no application to direct appeals in Arkansas. Jones v. State, 269 Ark 119, 598 SW2d 748 (1980); Willett v. State, 335 Ark 427, 983 SW2d 409 (1998) Smith dissenting. Relief was denied for reasons that appear in the opinion over a vigorous dissent by one justice and the concurrence in result only of another justice.

It is from this final decision , reported as Hale v. State, 343 Ark 62, ___SW2d___(2000) ("Hale II") that this petition is brought.

ARGUMENT

I. THE IMMUNITY AGREEMENT

This case is one of national importance. The Office of Independent Counsel exercises all the powers of a United States Attorney General[1] and, as such, the decision reached on granting this Petition, given the issues herein, will continue to be of importance to Federal prosecutions throughout the United States. Specifically, the Independent Counsel has the following authority:

> Authority and duties of an independent counsel
>
> (a) Authorities. - Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18.
>
> 28 USC § 594.

The United States of America, by and through its Independent Counsel, Robert Fiske, entered an immunity agreement with Petitioner herein on March 19, 1993. The nature and scope of that immunity agreement is the crux of this case. The immunity agreement, executed in writing, stated in the pertinent part:

---

[1] See 18 USC §§591-594.

> "If David L. Hale fully complies with the understandings specified in this Agreement, he will not be further prosecuted for *any crimes* related to his participation in the *conduct of the affairs of Capital Management Services, Inc,* Diversified Capital, and Madison Guaranty Savings and Loan, and *any other crimes to the extent that David L. Hale has disclosed such criminal activity to this office as of the date of this agreement"*
>
> (R. 182,) (Emphasis supplied)

The agreement was sold to Petitioner as an end to his legal troubles, both Federal and State. There was every reason to believe that Mr. Fiske had the authority to enter into such an agreement. His authority, as delineated by 28 USC 603.1 amounted to a Federal preemption of the investigation of all crimes linked to CMS.

> 28 CFR 603.1
>
> (a) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate to the maximum extent authorized by part 600 of this chapter whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with: (1) Madison Guaranty Savings & Loan Association; (2) Whitewater Development Corporation; or (3) Capital Management Services

The ability to grant immunity in furtherance of such investigation was inherent in the independent counsel statute. See 28 USC 594(e). See also United States v. Fitzhugh, 78 F3d 1326 (8th Cir 1996); Santobello v. New York, 404 US 257 (1971).

The right to prosecute or not prosecute is inherent in the office of the prosecutor as well. See, e.g. Bordenkircher v. Hayes, 434 US 357 (1978), United States v. Jacobs, 4 F3d 603 (8th Cir 1993); DeCamp v. Douglass Co. Franklin Grand Jury, 978 F2d 1047 (5th Cir 1992)[*passim]*; Hammers v. State, 261 Ark 585 (1977). It is clear that, had he chosen to do so, Robert Fiske could have charged the conduct at issue in the State case as yet another count of mail fraud under 18 U.S.C. § 1341. This he did not do. In any case, Fiske clearly had the authority to immunize Petitioner for any criminal conduct involved in the Whitewater investigation.

While this Court has long recognized the "two sovereigns" doctrine Heath v. Alabama, 474 US 82 (1985), such doctrine is inapplicable in the limited circumstances of this case where Congress has preempted the investigation of one set of events. Under the Supremacy Clause, Article VI, Section 2, of the Constitution of the United States, Congress certainly had such right. More than this, this Court has, in past, held that immunity agreements unequivocally granted by the Federal government must be honored by the State governments. See Murphy v. Waterfront Commission, 378 US 52 (1964).

Congress passed the Independent Counsel law to investigate crimes involving the powerful in political circles. Where, as here, the people under investigation are politically powerful and potentially have many friends remaining in office after their convictions, and are thus still in positions of power, the potential for mischief is simply too great to leave the cooperating Federal witness unprotected. If this conviction is allowed to stand, it will chill participation in Federal investigations all across the Country. For example, why should a future Salvatore Gravano agree to testify in a Federal investigation against a John Gotti when he knows that the self-same testimony could cause him to be prosecuted on State charges of murder or felon-in-possession of a firearm with all the danger that imprisonment in the state prison implies to his safety?

In the instant case, Samuel Dash, Ethics Advisor to Independent Counsel Kenneth Starr and former chief Watergate counsel noted "that the Independent Counsel's Office knew that

Stodola was receiving political pressure to prosecute Hale." Arkansas Democrat-Gazette, 5 February, 1996 . Stodola announced, only one day prior to the opening of the Tucker-McDougal Whitewater trial, that he intended to file state criminal charges against Hale. Hale was the Independent Counsel's chief Whitewater witness. It should be noted that no other Whitewater figures with State criminal exposure in Arkansas, were pursued by the State prosecutor. This included Webster Hubbell, who pled guilty to giving false Federal income tax information on his Federal returns and who, presumably, did not give accurate information on his State income tax return.

Little Rock Police Chief Louie C. Caudell had warned Stodola that nothing should be done that would hinder the Independent Counsel's investigation of the Whitewater matter. His subordinate, Captain Sam Williams, likewise warned that charging Hale while he was a cooperating witness was ill advised and would amount to "retreading the same territory" that the Independent Counsel had already investigated.

Indeed, former Federal judge and Carter administration Attorney General, Griffin Bell, at the time noted the political pressure on Stodola who was running for Congress as a Democrat. Bell stated:

> "Were he not a state prosecutor, he [Stodola] could be charged with tampering with a witness or obstruction of justice. He is interfering with a Federal criminal trial. . . . It looks like people in high position in Arkansas set out to thwart the Special Prosecutor. . .Its Arkansas lined up against the Federals."
>
> Washington Post, 22 March 1996

The State of Arkansas has alleged all along that it was not a party to the immunity agreement. In some sense of the word, this was not true. The investigation was conducted on behalf of all of the people of the United States, of which Arkansas is one. Indeed, the people of Arkansas were the primary beneficiary, having gotten rid of a corrupt governor in the process. More importantly, the State of Arkansas was invited to participate at the time of Hale's sentencing in Federal court. The State chose not to do so.

Given the penchant of those arrayed against Mr. Hale for using State prosecutions to hammer Federal witnesses, e.g., Linda Tripp in Maryland, it is clear that Mr. Stodola should not have been allowed to proceed with this prosecution. Indeed, the Tripp matter and this one make clear why it is so important that the "two sovereigns doctrine" not be applied to an immunized Federal witness in these limited circumstances.

II.

WILLFUL VIOLATION OF BOTH THE HOLDING IN KASTIGAR V. UNITED STATES 406 US 441 (1972) AND THE HOLDING IN HALE I

On interlocutory appeal, the Arkansas Supreme Court rejected the argument of Petitioner that there was any sort of Federal preemption created by the transactional immunity language of the immunity agreement. The Arkansas Supreme Court did agree, however, that use and derivative use of any immunized testimony was prohibited under Kastigar. While finding that no Kastigar violation had yet occurred, it strongly warned the lower Court that the issue attended throughout the trial. At trial, the testimony in the Federal Court was willfully and knowing utilized by Deputy Prosecutor Finkelstein on cross-examination to prepare questions and also as impeachment and for refreshing recollections. The State moreover argued this information on closing. Any of these uses was forbidden and each was clearly contemplated in advance by the Prosecution. When Petitioner did not immediately object, the Arkansas Supreme Court seized on this as a reason to deny relief, over a dissent and over a concurrence reading more like a dissent.

(See Hale II)[2]

Arkansas has no "plain error rule". Smith v. State, 468 Ark 282, 595 SW2d 671 (1980). Nevertheless, the Arkansas Supreme Court recognized, as the dissent points out, that flagrant violation on the part of the prosecution should be dealt with by the trial court, with or without objection.

> A third exception is a mere possibility, for it has not yet occurred in any case. That relates to the trial court's duty to intervene, without an objection, and correct a serious error either by an admonition to the jury or by ordering a mistrial. We implied in Wilson v. State, 126 Ark. 354, 190 S.W. 441 (1916), that no objection is necessary if the trial court fails to control a prosecutor's closing argument and allows him to go too far: "Appellant can not predicate error upon the failure of the court to make a ruling that he did not at the time ask the court to make, unless the remarks were so flagrant and so highly prejudicial in character as to make it the duty of the court on its own motion to have instructed the jury not to consider the same. See Kansas City So. Ry. Co. v. Murphy, 74 Ark. 256 [85 S.W. 428 (1905)]; Harding v. State, 94 Ark. 65 [126 S.W. 90 (1910)]."
>
> Wicks v. State, 270 Ark 781, 606 SW2d 366 (1980)

Once the error was called to its attention, as the dissent in Hale II notes, the trial court, did not choose to stop the offense. The Circuit Judge merely said, "Don't belabor this much more." This language indicates clearly that, after the use of the objectionable Kastigar materials were called to its attention, the trial Court shirked its responsibility to stop such usage. Indeed, the quoted language seemed to encourage the prosecution to continue violating Petitioner's Fifth Amendment rights. Petitioner was granted neither a mistrial nor an admonition to the jury nor another Kastigar hearing

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Even before this wilful use, it was apparent that those pursuing the prosecution had been exposed in various ways to the immunized materials.

as required by that case and its progeny.

Kastigar issues do not require an immediate objection be raised. This is clearly seen in the case of U.S. v. North, 910 Fd 843 (DC Cir 1990) which held that a hearing on Kastigar matters might be required at any point, before, during or after the trial. If contemporaneous objection could be required as to these issues, then logically a Kastigar hearing post-trial would be of no moment and an exercise in futility. The prohibition in Kastigar is against use and derivative use. The "crucial inquiry is whether the immunized testimony is *used in any way*" United States v. McDaniel, 482 F2d 305, 309-310 (8th Cir 1973) (Emphasis supplied) "In any way" covers a vast area of potential uses. As North notes, this is not a substantial use or excessive use prohibition, but *any use* in either the trial or investigation. By way of analogy, if a prosecutor used an improperly obtained confession to question a Defendant or in closing, it would be grounds for a mistrial whenever the objection was raised because it is the *improper use* that is the material inquiry.

The Arkansas Supreme Court erred both in Hale I and in Hale II in that there was clearly "use" and "derivative use" made of the immunized testimony. There was no firewall between the prosecutor's staff and the immunized testimony. Assigning the son-in-law of a Tucker finance chairman to prosecute this matter invited untoward use of the materials. That the said son-in-law admitted speaking with his father-in-law about the Tucker trial completely taints everything that follows. This is not to even mention the excerpts of Hale's Federal immunized grand jury testimony found in the Little Rock police files or the 1600 plus pages of Federal Trial Court immunized testimony which the prosecutor had in their files for well over a year. This prosecution was handled in a most unprofessional if not to say political way and should have died on motion to the trial court. It could even be inferred that the long delay in charging Hale with the State charges was occasioned by the need to wait, review the laundry list of wrong-doing provided by his testimony at the Tucker trial, and then craft a criminal information that bore some resemblance to one of those activities.[3]

Moreover, no rational person could believe that Deputy Prosecutor Finkelstein, who had access to the 1600 plus transcript pages of Hale's immunized Federal testimony for over a year, sat at counsel table and made up his cross-examination on the fly. Finkelstein actually read in Court from a transcript of Hale's immunized Federal Trial testimony. By referring to Prudential Bache and the obvious need to refer to verbatim statements of immunized testimony, it is clear that he utilized the federal immunized testimony to prepare his cross-examination of the Petitioner, as nothing else in the record of this case makes any reference whatsoever to the Prudential Bache series of transactions. It was only by reading and using the Tucker trial immunized testimony in advance of the State trial and during the trial that he could have known and presented this prosecution case.

The Kastigar violations here were clear, palpable, material and egregious, and should have resulted in a reversal.

III.

THE ARKANSAS SUPREME COURT UTILIZED THE WRONG STANDARD OF REVIEW IN ANALYZING WHETHER THERE WAS ENOUGH EVIDENCE TO SUSTAIN THE CONVICTION

Although this honorable Court does not often look at substantial evidence questions, this high profile case, involving an Independent Counsel and those in high political office, both in Little Rock, Arkansas, and in Washington, D.C., is worthy of consideration as an exception to the Court's usual rule. In this case, the Arkansas Supreme Court refuses to follow a holding of this Court.

Petitioner was charged with knowingly making a false or misleading statement to the Arkansas Insurance Department. There

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The record reflects that Douglass had urged Stodola to bring the charges over 1 ½ years prior to the time they were actually brought.

has never previously been a reported prosecution under this statute. The violation is a class C felony carrying a potential sentence up to three (3) years in prison. However, as Petitioner had pled guilty to two (2) felonies in Federal Court as part of his plea agreement with Independent Counsel Fiske, the State sought to charge him as an habitual offender, which was made known to the jury in the Court's reading of the charges, and to sentence him to eight (8) years. The jury, after careful weighing of the State's evidence and arguments, gave him 21 days. Petitioner is fully aware that a reversal and remand could result in retrial and perhaps a longer sentence, but feels as a matter of law and principle that he has been treated unjustly and that his rights were egregiously violated. Therefore, due to the total lack of substantial evidence as to the *mens rea* and whether Petitioner caused the July 6th letter to be generated, this Court should reverse and dismiss the case outright.

Under the Fourteenth Amendment of the Constitution of the United States, fundamental fairness and due process requires that every material element of the charge be proven beyond a reasonable doubt. In re Winship, 397 US 358 (1970)

The relevant standard as to what constitutes "proof beyond a reasonable doubt" and how such claims might be analyzed is contained in this Court's decision in Jackson v. Viriginia, 443 U.S. 307 (1979). This Court held:

> [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. . .that the Thompson [v. Louisville 362 U.S. 199 (1960)] "no evidence" rule is simply inadequate to protect against misapplications of the constitutional standard of reasonable doubt is readily apparent. . .Any evidence that is relevant that has a tendency to make the existence of an element of a crime slightly more probable than it would without the evidence. . .But it could not be seriously argued that such a 'modicum' of evidence could by itself rationally support a conviction beyond a reasonable doubt."

Id pages 319-320

The Arkansas Supreme Court has explicitly rejected this standard, stating that it has no bearing on Arkansas cases but is simply a standard utilized in Federal habeas corpus proceedings. As it has noted:

> The appellant relies upon the case of Jackson v. Virginia, 443 U.S. 307, 61 L.Ed. 2d 560 (1979) in his argument of error. In that case the United States Supreme Court held that one who applies to a federal court for habeas corpus relief is entitled to it "if it is found that upon the record adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."
>
> *We do not find that the language in the Jackson case requires us to abandon our decisions regarding the test of whether a jury verdict should stand in a criminal case.*

Jones v. State, 269 Ark. 119, 598 S.W.2d 748 (1980) at Page 120 (Emphasis supplied)

Instead, Arkansas applies something very much like the "some evidence" test that Jackson rejected.

> This court need consider *only that testimony which supports the verdict of guilty.* Thomas v. State, 312 Ark. 158, 847 S.W.2d 695 (1993).

Ricks v. State, 316 Ark. 601, 873 S.W.2d 808 (1994) (Emphasis supplied)
at 605.

In essence, only the State's case is viewed to see if there is "some evidence" to support it. There is no examination of what may fairly detract from the case.

In the instant case, the evidence was undisputed that David Hale neither wrote nor posted the offending document. The only potential basis for liability would have been if he had instructed or caused his employee, Joseph Niemann, to write the letter. See Ark Code Ann §5-2-402 . Nieman stated that he could not remember whose idea it was to write the letter in question. It was undisputed that the physical acts of writing, signing and mailing the July 6th letter were all performed by Niemann. There was no element of proof showing either the element of causation for the letter to be sent or the required mental state and intent to mislead.

Upon this shaky ground and bolstered by improperly admitted immunized testimony evidencing a similar course of dealing in the past, the State's entire case rests.

No rational finder of fact could have viewed the evidence presented at trial as proving, beyond a reasonable doubt, that David Hale caused the false or misleading report to be generated. Indeed, at the moment the letter was written, it was demonstrably true that the funds were present in the reserve account. The stock purchase or Rutherford refund, depending on whose version is believed, had not yet occurred even taking the State's own evidence at face value.

At the very least there had to be some evidence of a mental state to mislead. Niemann could not testify to this and even Rutherford stated that he thought that Petitioner had been duped by those running Med-a-Corp. As no mental state was specified in the statute, the State had to prove beyond a reasonable doubt that Petitioner made the false or misleading statement with purpose or knowingly or acted in reckless disregard. Ark Code Ann §5-2-203. This did not happen.

But, as Jackson is rejected by the Arkansas Supreme Court as a basis for decision, the substantial evidence question was analyzed in the light of whether there was a modicum of evidence supporting the State's position. This violates the Fourteenth Amendment Due Process Clause rights of this Petitioner.

IV.

PETITIONER WAS DENIED THE SIXTH AMENDMENT RIGHT TO CONFRONT AND CROSS-EXAMINE AND TO CALL WITNESSES FAVORABLE TO HIS CAUSE

As circumstantial evidence of some sort of wrong-doing, the State offered the testimony of George Michael Rutherford. Rutherford, a businessman from Texas, entered a course of dealing with Petitioner that resulted in the exchange of several checks. Depending on whose story was believed, Rutherford either was buying a stock called "Med-a-Corp" or he was investing money in Petitioner's company. Rutherford was supposedly flown in at great expense to the State from Tanzania in Africa.

Due to a series of health problems beyond Petitioner's control, Hale was not immediately ready for trial in April 1998. The State, at first, insisted that a videotape deposition be taken, in Petitioner's hospital room, if necessary. Given that Petitioner had suffered a life threatening cardiac event and was on pain medications that rendered him incapable of assisting in his own defense, counsel for Petitioner refused. The State then came up with a novel approach and asked the Court for an order requiring Petitioner to pay for Rutherford's return to America for a latter trial. Indeed, Petitioner was required to produce corroboration in depth that he was even ill before the Court would accept his explanation.

Subsequently, Rutherford was brought back to America in July 1998 and a videotape deposition was taken. Petitioner objected to the lack of "at trial" confrontation and also to the fact that Rutherford had been allowed to state his unavailability both "in the near and distant future" in an uncorroborated, uncritically accepted affidavit. Although the State had originally shown that this affidavit was disingenuous at best by virtue of the fact that, for a price, Rutherford could have been recalled, the Circuit Court ordered that the deposition be admitted.

Petitioner was clearly prejudiced by taking this testimony in advance of the trial held March 1999. He objected and noted that this Court's decisions showed a clear preference for at trial confrontation, absent some special circumstance–such as a child confronting a sexual predator. See Maryland v. Craig, 497 US 836 at page 850 (1990) In California v. Green, 399 US 149 (1970) makes clear that this is a trial right. Live appearance before the jury is mandated absent some vital public interest. No such interest was indicated here; nor should a general, uncorroborated affidavit not specific to the time of trial suffice to rob Petitioner of this right of confrontation under the Sixth Amendment. Petitioner was denied the ability to utilize evidence presented by the State in order to prepare cross-examination of Rutherford and did not know exactly what theory the State had in mind in this prosecution.

To make matters worse, Rebecca Winemiller, a business partner of Rutherford, was granted immunity from prosecution by the State. (Immunity agreements were worked out for Ms. Winemiller and for Mr. Rutherford by Blake Hendrix, a former law partner of deputy prosecutor Hugh Finkelstein, who, in turn, took over from Mr. White as main prosecutor on this case.) When she was subpoenaed by Petitioner for his case in chief, Ms. Winemiller was allowed to take the Fifth Amendment, denying Petitioner critical testimony in his defense. The Defendant was never even allowed to query about matters that could not possibly implicate Ms. Winemiller's Fifth Amendment rights. In essence, the State was able to deprive Petitioner of a witness simply by immunizing her.

V.

CUMULATIVE TRIAL ERROR

Where errors accumulate in a trial to the point that a Defendant is denied the right to a fair trial under the Sixth Amendment and fundamental fairness/due process of law under the Fifth and Fourteenth Amendments, the Court can reverse for so-called "cumulative error". United States v. Rivera, 900 F.2d 1462, 1470 (10th Cir. 1990), and Faught v. Washam, 329 S.W.2d 588, 604 (Mo. 1959). Clearly the errors elucidated herein both individually and, when taken with others, such as the trial Court dismissing summarily subpoenas issued by Petitioner without a hearing, there was an accumulation of error so egregious that even if one error or two errors could be said to be harmless, the entire group of errors caused Petitioner Hale to not receive a fair trial.

CONCLUSION

David L. Hale cooperated fully in a major federal investigation, did his federal time and, for his thanks, was charged in State court for a violation that clearly fell under the ambit of the 28 CFR 603.1 investigation. Former-Attorney General Griffin Bell characterized Stodola's prosecution of Hale as an attempt by a political machine to obstruct justice and intimidate a Federal witness. Mr. Hale asks this Court to help correct the kind of abuse of his rights to which he was subjected. For this reason, he asks that his petition for certiorari be granted and this conviction reversed.

Respectfully submitted,

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APPENDIX

David HALE v. STATE of Arkansas

CR 98-910 ___ S.W.2d ___

Supreme Court of Arkansas

Opinion delivered February 11, 1999

1. Appeal & error -- interlocutory appeal -- appropriate for supreme court to consider denials of motions to dismiss. -- Where appellant's arguments in his interlocutory appeal from denials of his motions to dismiss the State's charges pending against him were based on double jeopardy considerations, it was appropriate for the supreme court to consider those matters in an interlocutory appeal.

2. Constitutional law -- Double Jeopardy Clause -- protection afforded. --The Double Jeopardy Clause of the Fifth Amendment protects a defendant from a second prosecution for the same offense and from multiple punishments for the same offense.

3. Constitutional law -- dual-sovereignty doctrine -- discussed. -- The United States Supreme Court has long recognized the dual-sovereignty doctrine, which provides that when a defendant violates the peace and dignity of two sovereigns by breaking the laws of each, he or she has committed two distinct offenses, and thus successive prosecutions by the two sovereigns are not barred by the Double Jeopardy Clause of the Fifth Amendment; the Arkansas Supreme Court has likewise recognized the dual-sovereignty doctrine.

4. Constitutional law -- dual-sovereignty doctrine -- when inapplicable. --The dual-sovereignty doctrine will not apply if the subsequent state prosecution is a sham and a cover for a federal prosecution and thus in essential fact another federal prosecution; the second prosecution is more likely to be considered a sham or cover if the first prosecution resulted in an acquittal or if the two sovereigns acted in collusion instead of merely coordinating their

investigations or cooperating with one another.

5. Constitutional law -- dual-sovereignty doctrine -- applicable to appellant's case. -- The supreme court determined that appellant's case fell under the dual-sovereignty doctrine because the state of Arkansas and the federal government were two separate sovereigns that were entitled to prosecute appellant for the violation of their respective laws; the court found no merit to appellant's argument that the Arkansas charges were merely a sham or a cover for a second federal prosecution because the federal prosecution did not result in an acquittal, and the record established that the two sovereigns merely coordinated their simultaneous investigations instead of acting in collusion; the court concluded that the second state prosecution was not a sham or cover for a second federal prosecution; both sovereigns conducted separate investigations that resulted in separate prosecutions of the criminal charges against appellant, and, accordingly, the supreme court affirmed the trial court's ruling that the exception to the dual-sovereignty doctrine did not apply in the case.

6. Constitutional law -- immunity -- federal government may prosecute defendant given immunity from state government if evidence obtained from source independent of protected statements. -- Pursuant to a decision by the United States Supreme Court in *Kastigar v. United States*, 406 U.S. 441 (1972), the Eighth Circuit Court of Appeals has held that in accordance with the dual-sovereignty doctrine, the federal government may prosecute a defendant who has been given transactional or derivative use immunity from a state government so long as the federal prosecutor can sustain the burden of proving that the evidence to be used against the defendant was obtained from a source independent of the protected statements made in state court.

7. Constitutional law -- immunity -- appearance of deputy prosecutor's father-in-law's at federal trial where appellant testified too remote for State's prosecution to be tainted by immunized

federal testimony. -- Where, in a hearing held to determine whether the State's charges were based on evidence obtained from a source independent from appellant's immunized testimony in federal proceedings, the trial court acknowledged that a deputy prosecutor's father-in-law had attended a federal trial at which appellant appeared as a witness and had heard appellant testify, and where the deputy prosecutor admitted that he had discussed the federal trial with his father-in-law but could not remember the substance of their conversation, the supreme court agreed with the trial court's conclusion that this connection was much too remote to cause the State's prosecution to be tainted by the immunized testimony in the federal proceeding.

8. Constitutional law -- immunity -- mere cooperation between state & federal authorities occurred in appellant's case. -- Where the trial court found that the state prosecutor may have delayed filing an information so as not to conflict with federal proceedings and that the local police department coordinated its questioning of certain witnesses so as not to interfere with the federal investigation, correctly ruling that two sovereigns may coordinate their investigations so long as the immunized testimony, or evidence derived therefrom, is not shared, the supreme court agreed with the trial court that cooperation was all that occurred in appellant's case.

9. Constitutional law -- immunity -- credibility determination on prosecutor's averment regarding transcript of immunized testimony left to trier of fact. -- Where the court considered the fact that the state prosecutor had obtained a copy of appellant's immunized testimony, but the state prosecutor averred that he did not read any portion of the transcript, and where the trial court believed the testimony, the supreme court noted that this was a credibility determination best left to the trier of fact and not to the court on appeal; further, there was no testimony that the transcript had been read by anyone involved in the State's investigation and prosecution of appellant.

10. Constitutional law -- immunity -- supreme court affirmed trial court's ruling that state prosecution of appellant was not barred by federal grant of immunity. -- Under the circumstances, the supreme court could not say that the trial court's finding that the state proceeding was independent from appellant's federally immunized testimony, and the evidence derived therefrom, was clearly erroneous; accordingly, the supreme court affirmed the trial court's ruling that the state prosecution of appellant was not barred by the Independent Counsel's grant of immunity in the federal proceeding; in reaching its conclusion, however, the supreme court emphasized that the *Kastigar* issue would continue throughout the trial and would prevent the State from impermissibly using any of appellant's immunized testimony, or the evidence derived therefrom, at any point in the state proceeding.

11. Constitutional law -- federal preemption -- doctrine discussed. -- The doctrine of federal preemption is based upon the Supremacy Clause of the United States Constitution, which provides that state laws that interfere with or are contrary to the laws of Congress made in pursuance of the Constitution are invalid; there are three types of federal preemption: (1) express preemption, where Congress defines explicitly the extent to which its enactments preempt state law; (2) field preemption, where Congress's regulation of a field is so pervasive or the federal interest so dominant that an intent to occupy the entire field can be inferred, and (3) conflict preemption, where state law stands as an obstacle to the accomplishment of the full purposes and objectives of a federal statute, or where compliance with both laws is impossible.

12. Constitutional law -- federal preemption -- presumption that state's powers are not superseded by federal laws. -- There is a presumption that a state's historic powers are not superseded by federal laws unless that is the "clear and manifest" purpose of Congress; the preventing and dealing with crime is much more the business of the state than it is of the federal government.

13. Constitutional law -- federal preemption -- burden on moving

party to prove congressional intent. -- The burden was on appellant, as the moving party, to prove that Congress intended to preempt state law.

14. Words & phrases -- "competent" & "competent authority" defined. -- The word "competent" means "duly qualified; answering all requirements; having sufficient capacity, ability or authority"; "competent authority" is defined as "jurisdiction and due legal authority to deal with the particular matter in question."

15. Constitutional law -- federal preemption -- limitations on authority of Independent Counsel. -- By using the phrase "competent jurisdiction" in the Independent Counsel Reauthorization Act, it was clear that Congress intended to give the Independent Counsel authority to file federal charges in any federal court that had subject-matter and personal jurisdiction; in this respect, "competent jurisdiction" only specifies where the Independent Counsel may initiate prosecution; in contrast, in numerous sections of the Act, Congress made it clear that the only type of actions the Independent Counsel may file are for violations of "Federal criminal law" or for "Federal crimes"; the supreme court concluded that it was illogical to assume that Congress intended to give the Independent Counsel authority to file a federal criminal or civil action in state court.

16. Constitutional law -- federal preemption -- state prosecution of appellant not preempted by Independent Counsel Reauthorization Act. -- Reading the Independent Counsel Reauthorization Act and the supporting regulations together, the supreme court reached the conclusion that neither the Act nor the supporting regulations in any way limited the State's power under the dual-sovereignty doctrine to prosecute any figure or entity subject to the federal Whitewater investigation who may have also violated state law; likewise, there was no conflict between the federal and state law in the matter; the cases cited by appellant were inapposite and did not support his preemption argument; the supreme court affirmed the trial court's ruling that the state

prosecution was not preempted by the Independent Counsel Reauthorization Act.

17. Constitutional law -- double jeopardy -- overruling necessity required for court to grant mistrial without barring subsequent prosecution. -- Double jeopardy attaches in a jury trial once the jury is sworn; after the jury has been sworn and jeopardy attaches, the court can grant a mistrial without barring subsequent prosecution only if there is an overruling necessity.

18. Constitutional law -- double jeopardy -- trial court has discretion to determine whether overruling necessity requires mistrial. -- Regarding the determination whether an overruling necessity requires a the trial court to grant a mistrial, the State bears the burden of proving a manifest necessity, which is a circumstance that is forceful and compelling and is in the nature of a cause or emergency over which neither court nor attorney has control, or which could not have been averted by diligence and care; it is within the trial court's discretion to determine whether there is an overruling necessity that requires the grant of a mistrial, and the supreme court will not disturb that ruling absent an abuse of discretion.

19. Constitutional law -- appellant's illness was overruling necessity justifying mistrial -- double jeopardy did not prevent retrial. -- Where the record demonstrated that the trial court granted a mistrial due to appellant's unavailability and not, as he had asserted, because of the unavailability of a State's witness; where several other jurisdictions have held that a defendant's illness is a proper ground for granting a mistrial and that a subsequent retrial will not be prohibited by double jeopardy; where the supreme court concluded that the reasoning of those cases was sound because it would likely be a violation of the defendant's constitutional confrontation right if the trial were allowed to proceed in his absence; and where the supreme court could not say that the trial judge abused his discretion in light of his comments about leaving a sworn jury out for more than two

months in a highly publicized trial, the supreme court accordingly affirmed the trial court's ruling that appellant's illness was an "overruling necessity," under Ark.Code Ann. §§ 5-1-112(3), that justified a mistrial and that double jeopardy did not prevent his retrial.

Appeal from Pulaski Circuit Court; *David Bogard*, Judge; affirmed.

Bowden, Kendel & Jones, by: *David O. Bowden*; and *Tona M. DeMers*, for appellant.

Winston Bryant, Att'y Gen., by: *Kelly S. Terry*, Ass't Att'y Gen., for appellee.

Annabelle Clinton Imber, Justice.

The appellant, David L. Hale, brings this interlocutory appeal of the trial court's denial of his motions to dismiss the State's charges pending against him. Mr. Hale asserts several double jeopardy-based arguments including immunity, preemption, and the exception to the dual-sovereignty doctrine. Mr. Hale also contends that the trial court erred when it granted a mistrial due to an "overruling necessity" under Ark. Code Ann. §§ 5-1-112(3) (Repl. 1997). We affirm on all points.

Because this is an interlocutory appeal, the complicated and detailed facts of this case have not yet been resolved by the trier of fact. Suffice it to say, the State claims that in July of 1993 Mr. Hale entered into a complex scheme whereby he directed the president of the National Savings Life Insurance Company (NSLIC) to make a false or misleading statement to the Arkansas Insurance Department in violation of Ark. Code Ann. §§ 23-60-109 (Repl. 1994). The alleged scheme involved Mr. Hale's participation in the affairs of the Small Business Administration, Capital Management Services, Inc., and other business entities. In April of 1994, the Insurance Department referred the matter to the Pulaski County Prosecutor's Office and the Little Rock Police

Department for criminal investigation and prosecution.

Around the same time, the Independent Counsel for the Department of Justice began investigating Mr. Hale's business transactions in relation to the "Whitewater" matter. On March 19, 1994, Mr. Hale entered into a plea agreement with the Independent Counsel whereby Mr. Hale agreed to plead guilty to the felonies of conspiracy and mail fraud and to fully cooperate with the Independent Counsel in its investigation of the Whitewater matter. In exchange, the Independent Counsel agreed to ask for a reduction in Mr. Hale's sentence, and granted Mr. Hale immunity as follows:

If David L. Hale fully complies with the understandings specified in this Agreement, he will not be further prosecuted for any crimes related to his participation in the conduct of the affairs of Capital Management Services, Inc., Diversified Capital, Inc., and Madison Guaranty Savings and Loan, and any other crimes, to the extent David L. Hale has disclosed such criminal activity to this Office as of the date of this agreement.

Meanwhile, the state officials continued their investigation of Mr. Hale's alleged false and misleading statement to the Arkansas Insurance Department. In November of 1994, members of the Pulaski County Prosecutor's Office, the Little Rock Police Department, and the Independent Counsel's Office met to discuss the simultaneous investigations. The Independent Counsel expressed his view that it would be highly unusual for a state prosecutor to initiate separate criminal charges while an individual was cooperating in a federal investigation. Accordingly, the Independent Counsel may have suggested either that the Prosecutor's Office delay filing its charges until after Mr. Hale testified, or that Mr. Hale's dealings with the Arkansas Insurance Department be " taken into account and considered at Mr. Hale's federal sentencing hearing." The state Prosecutor did not specifically agree to either request at that time. In fact, in February of 1996, the state Prosecutor sent a letter to the Independent

Counsel announcing that he had decided to file separate state charges against Mr. Hale instead of allowing the matter to be addressed at Mr. Hale's federal sentencing.

In April of 1996, Mr. Hale testified as a witness for the Independent Counsel in the criminal trials of Governor Jim Guy Tucker, James McDougal, and Susan McDougal. In December of 1996, the State filed a felony information that charged Mr. Hale with violating Ark. Code Ann. §§ 23-60-109 by filing a false or misleading statement or document required to be filed by Arkansas law.

In response, Mr. Hale filed several motions to dismiss in which he asserted that the subsequent state prosecution was barred by double jeopardy. Specifically, Mr. Hale claimed that the exception to the dual-sovereignty doctrine applied, that the State action was preempted by federal law, and that he was immune from state prosecution pursuant to the March 19, 1994 plea agreement with the Independent Counsel. The trial court rejected each of these arguments, and the case proceeded to trial.

The trial began on Wednesday, April 22, 1998. After the jury was sworn, the court excused the jury for the day because Mr. Hale was not feeling well. The next morning, Thursday, April 23, Mr. Hale did not appear for trial because he had been admitted to the hospital for heart problems. The court granted a seven-day continuance. On Thursday, April 30, the jury convened for the third time. Again, Mr. Hale was not present due to heart problems. Mr. Hale's attorney estimated that Mr. Hale would be released from the hospital on the afternoon of Monday, May 4. Mr. Hale's attorney, however, did not provide the court with a date certain on which Mr. Hale would be available for trial. The only date discussed by the court for rescheduling the trial was in early July. The court then expressed concern over leaving a sworn jury out for over two months in a highly publicized trial. In this respect, the trial judge said, "they [the jury] have been cast onto the stage as actors now, and they can't very well ignore what's going on.

Human nature is not that way. There's too big of a chance to run." At this point, the trial court granted the State's motion for mistrial because Mr. Hale's illness was an "overruling necessity" under Ark. Code Ann. §§ 5-1-112. Soon thereafter, Mr. Hale filed a motion for dismissal in which he declared that double jeopardy prevented the State from bringing him to trial again because there was no "overruling necessity," under Ark. Code Ann. §§ 5-1-112, for granting the mistrial. The trial court denied the motion.

Mr. Hale now brings this interlocutory appeal from the denials of his motions to dismiss the State's charges pending against him. Because these arguments are based on double jeopardy considerations, it is appropriate for us to consider these matters in an interlocutory appeal. *See Edwards v. State*, 328 Ark. 394, 943 S.W.2d 600 (1997), *cert. denied*, 118 S.Ct. 370 (1997); *Rowlins v. State*, 319 Ark. 323, 891 S.W.2d 56 (1995).

I. Dual Sovereignty

The Double Jeopardy Clause of the Fifth Amendment protects a defendant from a second prosecution for the same offense and from multiple punishments for the same offense. *State v. Johnson*, 330 Ark. 636, 956 S.W.2d 181 (1997); *Edwards, supra*. Hence, Mr. Hale claims that his plea agreement with the Independent Counsel bars any subsequent state prosecution. However, the United States Supreme Court has long recognized the dual-sovereignty doctrine, which provides that when a defendant violates the "peace and dignity" of two sovereigns by breaking the laws of each, he or she has committed two distinct offenses, and thus successive prosecutions by the two sovereigns are not barred by the Double Jeopardy Clause of the Fifth Amendment. *See Bartkus v. Illinois*, 359 U.S. 121 (1959) (state prosecution following federal prosecution); *Abbate v. United States*, 359 U.S. 187 (1959) (federal prosecution following state prosecution). Likewise, we recognized the dual-sovereignty doctrine in *State v. Johnson,supra*, where we held that the State could prosecute the defendant for rape even though rape was used for enhancement purposes in the calculation of the defendant's punishment for a federal conviction.

In *Bartkus*, the Supreme Court admonished that the dual-sovereignty doctrine would not apply if the subsequent state prosecution was a "sham and a cover for a federal prosecution, and thereby in essential fact another federal prosecution." *Bartkus, supra; see also United States v. Basile*, 109 F.3d 1904 (8th Cir. 1997); *United States v. Williams*, 104 F.3d 213 (8th Cir. 1997); *United States v. Garner*, 32 F.3d 1905 (8th Cir. 1994). In other words, the dual-sovereignty doctrine will not apply if the second prosecution is merely an attempt at a second bite at the proverbial apple. The second prosecution is more likely to be considered a "sham or cover" if the first prosecution resulted in an acquittal, or the two sovereigns acted in collusion instead of merely coordinating their investigations or cooperating with one another. *See Bartkus, supra; Basile, supra; Williams, supra; Garner, supra.*

Clearly, this case falls under the dual-sovereignty doctrine because, as in *Bartkus* and *Abbate*, the state of Arkansas and the federal government are two separate sovereigns that are entitled to prosecute Mr. Hale for the violation of their respective laws. We find no merit to Mr. Hale's argument that the Arkansas charges are merely a "sham or a cover" for a second federal prosecution because the federal prosecution did not result in an acquittal, and the record establishes that the two sovereigns merely coordinated their simultaneous investigations instead of acting in collusion. In particular, the state Prosecutor chose to file charges in state court instead of allowing the matter to be considered during sentencing in federal court as suggested by the Independent Counsel. Nor is there any indication that the FBI or the Office of the Independent Counsel shared any information from the federal investigation with the state Prosecutor's Office, the Arkansas Insurance Department, or the Little Rock Police Department. At most, the contacts between federal and state officials in 1994 and 1995 involved the coordination of their respective investigations. For these reasons, we conclude that the second state prosecution was not a "sham or cover" for a second federal prosecution. Both sovereigns conducted separate investigations that resulted in separate prosecutions of the criminal charges against Mr. Hale. Accordingly, we affirm the trial court's ruling that the exception to the dual-sovereignty doctrine does not apply in this case.

II. Immunity

Next, Mr. Hale contends that double jeopardy bars state prosecution because the Independent Counsel gave him transactional immunity from any prosecutions. As previously mentioned, Mr. Hale's plea agreement with the Independent Counsel provided, in relevant part, that:

> If David L. Hale fully complies with the understandings specified in this Agreement, he will not be further prosecuted for any crimes related to his participation in the conduct of the affairs of Capital Management Services, Inc., Diversified Capital, Inc., and Madison Guaranty Savings and Loan, and any other crimes, to the extent David L. Hale has disclosed such criminal activity to this Office as of the date of this agreement.

(Emphasis added.) Relying upon the phrase "any crimes," Mr. Hale asserts that the Independent Counsel gave him transactional immunity from all state and federal prosecutions related to the Whitewater transactions. Although we realize that there is a difference between "transactional" immunity, which protects the witness from prosecution for offenses to which the compelled testimony relates, and "use or derivative use" immunity, which only protects the witness from the use of the compelled testimony and the evidence derived therefrom, *Kastigar v. United States*, 406 U.S. 441 (1972), we need not decide what type of immunity Mr. Hale was given in his agreement with the Independent Counsel. Rather, the relevant inquiry in this appeal involves only what effect, if any, the Independent Counsel's grant of immunity has on the subsequent state prosecution.

In *Kastigar v. United States*, 406 U.S. 441 (1972), the United

States Supreme Court held that the Fifth Amendment right against self-incrimination only protected the defendant from use of his incriminating statements, or evidence derived therefrom, but not from prosecution for related crimes. Hence, the Court concluded that even if a state granted transactional or use immunity to a defendant in exchange for his or her incriminating testimony, the federal government could prosecute the defendant for a similar federal crime so long as the federal government could sustain the heavy burden of proving that its evidence was "derived from a legitimate source wholly independent of the compelled testimony." *Id.* Specifically, the Court instructed that:

> Once a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.
>
> This burden of proof . . . is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.
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> * * *
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> One . . . need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.

Id.

Pursuant to *Kastigar*, the Eighth Circuit has held on numerous occasions that in accordance with the dual-sovereignty doctrine, the federal government may prosecute a defendant who has been given transactional or derivative use immunity from a state government so long as the federal prosecutor can sustain the burden of proving that the evidence to be used against the defendant was obtained from a source independent of the protected statements made in state court. *See, e.g., United States v.First Western State Bank*, 491 F.2d 780 (8th Cir. 1974); *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973).

In *United States v. First Western State Bank, supra,* the Eighth Circuit explained the concept as follows:

> The United States as a sovereign is not precluded from enforcing its laws by the grant of immunity of another sovereign, in this case the state. However, as a matter of fairness to the defendants and as a constitutional guarantee against self-incrimination, the state immunized testimony cannot be used, directly or indirectly, to prosecute a federal charge. *Murphy v. Waterfront Commission*, 378 U.S. at 79, 84 S.Ct. 1594.
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> * * *
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> The sovereign not offering immunity has the undeniable right to protect the integrity of its law enforcement prerogatives by prosecuting anyone who allegedly has committed an offense against its peace and dignity. When its own evidence and investigation discloses acts of criminal activity, an undeniable right to prosecute exists. This right cannot be controlled, thwarted, or diminished by another sovereign granting immunity from prosecution of a kindred offense. Fair play and constitutional guarantees demand, however, that the prosecuting sovereign not use, directly or indirectly, the immunized testimony or any fruits from it. *Kastigar v. United States, supra; Murphy v. Waterfront Commission, supra.* If the prosecuting sovereign has made its independent investigation and can show non-use of the immunized testimony, either by lack of access to the immunized testimony or direct statements made in good faith that it did not use the immunized testimony, it should have a clear right to proceed with its own prosecution. However, under *Kastigar* and *Murphy* the prosecuting sovereign does have the burden of showing an independent source for its evidence.

Id.

In the case before us today, the trial court held a *Kastigar* hearing to determine if the State's charges were based on evidence obtained from a source independent from Mr. Hale's immunized testimony in the federal proceedings. First, the trial court acknowledged that the deputy prosecutor's father-in-law, Mr. Sam Winstead, attended the federal trial of Governor Jim Guy Tucker and heard Mr. Hale testify. The deputy prosecutor admitted that he discussed the Tucker trial with his father-in-law, but explained that he could not remember the substance of their conversation. The court concluded, and we agree, that this connection was much too remote to cause the State's prosecution to be tainted by the immunized testimony in the federal proceeding.

Second, the trial court found that the state Prosecuting Attorney may have delayed filing its information so as not to conflict with the federal proceedings. In addition, the court found that the Little Rock Police Department coordinated its questioning of certain witnesses so as not to interfere with the federal investigation. The court, however, correctly ruled that two sovereigns may coordinate their investigations so long as the immunized testimony, or evidence derived therefrom, is not shared. We agree that cooperation is all that occurred in this case.

Finally, the court considered the fact that the state Prosecutor had obtained a copy of Mr. Hale's immunized testimony. However, distinguishable from *United States v. McDaniel*, *supra*,the state Prosecutor averred that he did not read any portion of the transcript. The trial court believed this testimony, which is a credibility determination that is best left to the trier of fact, and not this court on appeal. *See Freeman v. State*, 331 Ark. 130, 959 S.W.2d 400 (1998); *Sanford v. State*, 331 Ark. 334, 962 S.W.2d 335 (1998). In fact, there was no testimony that the transcript had been read by anyone involved in the State's investigation and prosecution of Mr. Hale.

For these reasons, we cannot say that the trial court's finding that the state proceeding was independent from the federally immunized testimony, and the evidence derived therefrom, is clearly erroneous. Accordingly, we affirm 1 the trial court's ruling that the state prosecution of Mr. Hale is not barred by the Independent Counsel's grant of immunity in the federal proceeding. In reaching this conclusion, however, we admonish, as the trial court correctly did, that the *Kastigar* issue continues throughout the trial and prevents the State from impermissibly using any of Mr. Hale's immunized testimony, or the evidence derived therefrom, at any point in the state proceeding.

III. Preemption

Next, Mr. Hale contends that state prosecution is preempted by the Independent Counsel Preauthorization Act of 1994, 28 U.S.C.S §§ 591 to 599 (1988 & Supp. 1998), which he claims gave the Independent Counsel the sole authority to prosecute any crimes relating to Whitewater. We disagree.

The doctrine of federal preemption is based upon the Supremacy Clause of the United States Constitution, which provides that state laws that "interfere with, or are contrary to the laws of congress, made in pursuance of the constitution" are invalid. *Ciba-Geigy Corp. v. Alter*, 309 Ark. 426, 834 S.W.2d 136 (1992). There are three types of federal preemption: 1) express preemption, where Congress defines explicitly the extent to which its enactments preempt state law; 2) field preemption, where Congress's regulation of a field is so pervasive or the federal interest so dominant that an intent to occupy the entire field can be inferred, and 3) conflict preemption, where state law stands as an obstacle to the accomplishment of the full purposes and objectives of a federal statute, or where compliance with both laws is impossible. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1990); *Twenty-five Residents v. Arkansas Highway & Transp. Comm'n*, 330 Ark. 396, 954 S.W.2d 242 (1997); *Medlock v. Leathers*, 311 Ark. 175, 842 S.W.2d 428 (1992). In his reply brief, Mr. Hale concedes that the Independent Counsel Reauthorization Act does not contain an express preemption provision. Hence, we must only consider whether either of the latter two forms of preemption exits. In making this determination, we start with the presumption that the State's historic powers are not superseded by federal laws unless that is the "clear and manifest" purpose of Congress. *Wisconsin Public Intervenor, supra; Ciba-Geigy Corp., supra.* In *Patterson v. New York*, 432 U.S. 197 (1977), the United States Supreme Court recognized that "the preventing and dealing with crime is much more the business of the State than it is of the Federal Government." Finally, the burden is on Mr. Hale, as the moving party, to prove that Congress intended to preempt state law. *See Ciba-Geigy Corp., supra.*

First, Mr. Hale contends that federal preemption may be found in section 594(a) of the Independent Counsel Reauthorization Act, which provides in relevant part that:

> Notwithstanding any other provision of law, an independent counsel appointed under this subchapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this subchapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction and control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18 [18 USCS §§ 2516]. Such investigative and prosecutorial functions and powers shall include --
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> * * *
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> (9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States;

28 U.S.C.S. §§ 594(a)(9) (emphasis added). Mr. Hale argues that the phrase "any court of competent jurisdiction" includes all state courts. Mr. Hale, however, is confusing "concurrent" with"competent" jurisdiction. As explained above, pursuant to the dual-sovereignty doctrine, the state and federal courts have "concurrent" jurisdiction to file criminal charges against a defendant. However, the word "competent" means "duly qualified; answering all requirements; having sufficient capacity, ability or authority." Black's Law Dictionary 294 (6th ed. 1990). Likewise, "competent authority" is defined as "jurisdiction and due legal authority to deal with the particular matter in question." *Id.* By using the phrase "competent jurisdiction," it is clear that Congress intended to give the Independent Counsel authority to file federal charges in any federal court that had subject-matter and personal jurisdiction. In this respect, "competent jurisdiction" only specifies where the Independent Counsel may initiate prosecution. In contrast, in numerous sections of the Act, Congress made it clear that the only type of actions the Independent Counsel may file are for violations of "Federal criminal law" or for "Federal crimes." *See, e.g.*, 28 U.S.C.S. §§§§ 591(a), 591(c) and 593(b). It is simply illogical to assume that Congress intended to give the Independent Counsel authority to file a federal criminal or civil action in state court.

Next, Mr. Hale argues that federal preemption can be found in the supporting regulations, 28 C.F.R. §§ 603.1 (1998), which define the jurisdiction of the Independent Counsel, as follows:

(a) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate to the maximum extent authorized by part 600 of this chapter whether any individuals or entities have committed a violation of any federal criminal law or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationship with:

(1) Madison Guaranty Savings & Loan Association;

(2) Whitewater Development Corporation; or

(3) Capital Management Services

(b) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation.

(c) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate any violation of section 1826 of title 28 of the U.S. Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal law, in connection with any investigation of the matters described in paragraph (a) or (b) of this section.

(d) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to seek indictments and to prosecute, or bring civil actions against, any person or entities involved in any of the matters referred to in paragraph (a), (b), or (c) of this section who are reasonably believed to have committed a violation of any federal criminal or civil law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense.

(Emphasis added.) Although this regulation specifically refers to the Independent Counsel's jurisdiction and authority to prosecute matters relating to Capital Management Services, which is an entity indirectly involved in the current litigation, the regulation qualifies in five instances that these powers only relate to violations of federal, not state, criminal or civil law.

Reading the Act and the supporting regulations together, we reach the inescapable conclusion that neither the Act nor the supporting regulations in any way limit the State's power under the dual-sovereignty doctrine to prosecute any Whitewater figure or entity who may have also violated state law. Likewise, there is no conflict between the federal and state law in this matter. Finally, the cases cited by Mr. Hale are inapposite and do not support his preemption argument. *See Hamm v. City of Rock Hill*, 379 U.S. 306 (1964); *Baucom v. Martin*, 677 F.2d 1346 (11th Cir. 1982); *United States v. Daniels*, 929 F.2d 128 (4th Cir. 1991). Accordingly, we affirm the trial court's ruling that the state prosecution is not preempted by the Independent Counsel Reauthorization Act.

IV. Mistrial

Finally, Mr. Hale contends that the trial court erred when it granted a mistrial, and thus, the State cannot bring him to trial a second time under the Double Jeopardy Clause. We have previously held that double jeopardy attaches in a jury trial once the jury is sworn. *Tipton v. State*, 331 Ark. 28, 959 S.W.2d 39 (1998). Thus, once the jury has been sworn and jeopardy attaches, the court can grant a mistrial without barring subsequent prosecution only if there is an "overruling necessity." *See Smith v. State*, 307 Ark. 542, 821 S.W2d 774 (1992); *Wilson v. State*, 289 Ark. 141, 712 S.W.2d 654 (1986). Specifically, Ark Code Ann. §§ 5-1-112(3) (Repl. 1997) provides that:

A former prosecution is an affirmative defense to a subsequent prosecution for the same offense under any of the following circumstances:

* * *

(3) The former prosecution was terminated without the express or implied consent of the defendant after the jury was sworn or, if trial was before the court, after the first witness was sworn, unless the termination was justified by overruling necessity.

In making this determination, we have said that the State bears the burden of proving a manifest necessity, which is a circumstance that is "forceful and compelling" and is "in the nature of a cause or emergency over which neither court nor attorney has control, or which could not have been averted by diligence and care." *Jones v. State*, 288 Ark. 162, 702 S.W.2d 799 (1986); *Cody v. State*, 237 Ark. 15, 371 S.W.2d 143 (1963). We have also said that it is within the trial court's discretion to determine whether there is an "overruling necessity" that requires the grant of mistrial, and we will not disturb that ruling absent an abuse of discretion. *Shaw v. State*, 304 Ark. 381, 802 S.W.2d 468 (1991).

On appeal, Mr. Hale argues that the trial court granted the mistrial due to the unavailability of one of the State's witnesses.2 This argument is misplaced because the record clearly demonstrates that the trial court granted a mistrial due to Mr. Hale's unavailability and not because of the unavailability of the State's witness. In several cases, we have said that there is an overruling necessity to grant a mistrial when a juror, state witness, or the defense counsel is ill. *See, e.g., Shaw, supra* (sick juror); *Jones, supra* (sick state witness); *Franklin v. State*, 251 Ark. 223, 471 S.W.2d 760 (1971) (intoxicated defense counsel). Although we have never squarely dealt with the issue, several other jurisdictions have held that a defendant's illness is a proper ground for granting a mistrial, and that a subsequent retrial will not be prohibited by double jeopardy. *See, e.g., Loux v. United States*, 389 F.2d 911 (9th Cir. 1968); *In re Dunkerley*, 376 A.2d 43 (Vt. 1977); *Glover v. United States*, 301 A.2d 219 (D.C. 1973); *Jones v. State*, 187 S.W.2d 400 (Tex. Crim. App. 1945). We think that the reasoning of these cases is sound as it would likely be a violation of the defendant's constitutional right to confrontation if the trial was allowed to proceed in his absence. Moreover, we cannot say that the trial judge abused his discretion in light of his comments about leaving a sworn jury out for over two months in a highly publicized trial. Accordingly, we affirm the trial court's ruling that Mr. Hale's illness was an "overruling necessity," under Ark. Code Ann. §§ 5-1-112(3), that justified a mistrial, and that double jeopardy does not prevent his retrial.

Affirmed.

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[1] In light of our affirmance on this issue, we need not reach the State's alternative argument of collateral estoppel.

[2] At the conclusion of the April 23 hearing, Mr. Hale's attorneys planned to approach their client about the State's proposal to preserve the testimony of its witness. However, there is nothing in the record to indicate what happened to that proposal.

David HALE v. STATE of Arkansas

CR 99-985 ___ S.W.3d ___

Supreme Court of Arkansas

Opinion delivered December 7, 2000

1. **Evidence – sufficiency – standard of review. –** When reviewing the sufficiency of evidence on appeal, the supreme court does not reweigh evidence but determines instead whether evidence supporting the verdict is substantial; substantial evidence is defined as direct or circumstantial evidence that is forceful enough to compel reasonable minds to reach a conclusion one way or another and that goes beyond mere speculation or conjecture; in determining whether there is substantial evidence, the supreme court reviews the evidence in the light most favorable to the State; only evidence supporting the verdict is considered; the supreme court will affirm if there is any substantial evidence to support the verdict.

2. **Evidence – challenge to sufficiency – supreme court declined to explicitly adopt *Jackson*'s "rational fact-finder test" as appropriate standard of review. –** The United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), in determining whether habeas corpus relief should be granted to a defendant convicted of murder, stated that the relevant question was whether, upon viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt; this language did not require the supreme court to abandon its decisions regarding the test of whether a jury verdict should stand in a criminal case; there must be substantial evidence to support such a decision; accordingly, the supreme court adhered to the substantial-evidence test in reviewing sufficiency of the evidence and declined to explicitly adopt the "rational fact-finder test."

3. **Evidence – document filed with Arkansas Insurance Department – evidence sufficient that appellant caused letter to be filed.** – There was substantial evidence that appellant caused the letter to be filed with the Arkansas Insurance Department where appellant's employee testified unequivocally that appellant knew about the letter before it was filed, appellant acknowledged during his testimony that he was familiar with the letter, and appellant was the owner of the insurance company and was the only person directing the events that caused money to be deposited into the company's account, thereby triggering the need to notify the Insurance Department that the company's capital deficiency had been cured; the evidence directly supported the conclusion that appellant caused the filing of the July 6 letter and, therefore, was ultimately responsible to the same extent as if he had filed the letter himself.

4. **Insurance – filing of letter clearly required by law – appellant admitted knowledge of filing requirement.** – The filing of the July 6 letter with the Insurance Department was clearly required by the Insurance Code; the meaning of the term "this code" as used in Ark. Code Ann. §§ 23-60-109(Repl. 1994) included sections 23-69-105 -- 23-69-141; thus, "this code" included Ark. Code Ann. §§ 23-69-138(c)(Repl. 1994), which makes provision for curing a deficiency and calls for deeming the insurer insolvent if the deficiency is not timely cured; the plain language of section 23-69-138(c) required the filing of the July 6 letter; moreover, the insurance commissioner testified that the July 6 letter advising the Insurance Department that the capital deficiency had been cured was "a statutory requirement of curing the impairment," and appellant admitted during his own testimony that he knew of the "requirement" that the Insurance Department be notified when the company's capital deficiency was cured.

5. **Evidence – conviction allowed if information contained indocument is either false or misleading – appellant clearly knew letter was misleading.** – Arkansas Code Annotated section 23-60-109 allows the jury to convict if the information contained

in a document is either false or misleading in any material respect; the July 6 letter from the insurance company to the Insurance Department noted the amount of the company's capital impairment and then stated that $150,000 had been deposited into the savings account of the company, thereby purportedly indicating that the capital impairment had been cured; however, the evidence showed that appellant knew when the July 6 letter was sent to the Insurance Department that (a) he was going to have to return the $150,000 to the lender sometime during that week, and (b) the company's capital impairment had not been cured.

6. **Evidence – violation of Ark. Code Ann. §§ 23-60-109 – conviction supported by substantial evidence.** – Where there was substantial evidence that appellant caused the document to be filed with the Insurance Department, the letter was required by the Insurance Code, and appellant knew that the statements contained in the letter were either false or misleading, the evidence supporting appellant's conviction for violating Ark. Code Ann. §§ 23-60-109 was substantial.

7. **Constitutional law – prosecutorial immunity – defendant granted immunity from one sovereign may be prosecuted by another sovereign if evidence obtained from source independent of protected statements.** – In *Kastigar v. United States*, 406 U.S. 441 (1972) the U.S. Supreme Court held that once a defendant demonstrates that he has testified under a grant of immunity from one sovereign, another sovereign may nevertheless prosecute the defendant for related crimes so long as the prosecutor sustains the heavy burden of proving that its evidence was derived from a legitimate source wholly independent of the compelled testimony; one sovereign's right to prosecute those persons who violate its criminal laws is not thwarted or diminished by another sovereign's grant of immunity; however, the prosecuting sovereign may not use, directly or indirectly, the immunized testimony or any fruits from it; the defendant need only show that he testified under a grant of immunity; after that, the burden shifts to the prosecution to prove that all of the

evidence it proposes to use was derived from legitimate independent sources.

8. **Constitutional law – trial court determined that no *Kastigar* violation occurred – supreme court will not second-guesscredibility determinations.** – Appellant, upon discovering that excerpts from his immunized grand-jury testimony were contained in the police department case file, moved for a *Kastigar* determination, and at the hearing the trial court issued an order denying appellant's *Kastigar* motion and refusing to dismiss the case; in doing so, the trial court found that there was no showing by the prosecution that the immunized grand-jury testimony was used in any way and that testimony contained in the police file did not bear any relationship to charges in the present case; the officer who investigated appellant's case testified that the grand-jury testimony was not seen or used in any way; the trial court apparently believed this testimony; the supreme court will not second-guess such credibility determinations.

9. **Appeal & error – preservation of issue for appeal – contemporaneous-objection rule.** – A contemporaneous objection must be made to the trial court before the supreme court will review an alleged error on appeal.

10. **Appeal & error – preservation of issue for appeal – objections.** – In order to properly preserve an issue for appeal, the defendant must timely object at the first opportunity and renew his objection each time the witness is questioned about the matter.

11. **Appeal & error – prosecutor failed to timely object – issue not preserved for review.** – Where theprosecutor's first question regarding appellant's federal immunized testimony occurred on page 2224 of the record, without objection, and the prosecutor continued to question appellant about his federal testimony time and time again, until finally, on page 2247 of the record, defense counsel made the *Kastigar*

objection, the *Kastigar* issue was not preserved due to the lack of a contemporaneous objection.

12. **Constitutional law -- rights under *Kastigar* -- how preserved.** -- The defendant's rights under *Kastigar* are preserved by defense counsel making "appropriate objections" at trial; there has been no case law that established an exception to the contemporaneous-objection rule.

13. **Appeal & error -- pretrial motion -- failure to object at trial.** -- When a pretrial motion is denied the issue is preserved for appeal and no further objection at trial is needed, but failure to object at trial precludes the partyfrom relying on anything disclosed at trial that was not brought out at the pretrial hearing.

14. **Appeal & error -- use of appellant's federal testimony on cross-examination was not within scope of pretrial *Kastigar* motion -- timely & contemporaneous objection at trial was necessary.** -- Where appellant's pretrial *Kastigar* motion involved certain excerpts of his immunized grand-jury testimony that were found in the police department file, and nothing in his pretrial *Kastigar* motion related to federal testimony used by the prosecutor during his cross-examination of appellant at trial, the use of appellant's federal testimony on cross-examination was not within the scope of his pretrial *Kastigar* motion, and so a timely and contemporaneous objection at trial was necessary.

15. **Appeal & error -- contemporaneous objection to use of immunized federal testimony needed to preserve issue for appellate review -- trial judge must be given opportunity to timely correct mistake.** -- Even if the supreme court had concluded that the admonition in *Hale v. State*, 336 Ark. 345, 985 S.W. 2d 303 (1999), could be interpreted as a favorable ruling that prohibited the State from impermissibly using anyof appellant's immunized federal testimony at any point in the proceeding, it was still necessary for appellant to make a contemporaneous objection to the prosecutor's repeated use of immunized federal testimony in

order to preserve the issue for appellate review; the trial judge must be given an opportunity to timely correct the mistake; otherwise, if a contemporaneous objection is not made at the time evidence is offered during the jury trial, the proverbial bell will have been rung and the jury prejudiced.

16. **Trial – failure to renew objection constitutes waiver – no duty on trial court to make rulings on own motion.** – When a defendant successfully objects to a question on the basis of hearsay, and the same or similar question is later asked, the defendant must renew his objection or else the initial objection is waived; there is no affirmative duty on a trial court to subsequently make evidentiary rulings on its own motion.

17. **Constitutional law – Confrontation Clauses of United States and Arkansas Constitutions provide identical rights – rights guaranteed by Confrontation Clause.** – The supreme court has consistently interpreted the Confrontation Clauses of the United States and Arkansas Constitutions to provide identical rights; the Confrontation clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact; it does not guarantee criminal defendants an absolute right to a face-to-face meeting with witnesses against them at trial; the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where the trial court makes a case-specific finding that denial of such confrontation is necessary to further an important public policy and only where reliability of the testimony is otherwise assured.

18. **Witnesses – video-deposition testimony – when admissible.** – Courts have consistently allowed the use of video depositions in circumstances where the witness was shown to be unavailable; when a witness is actually unavailable at trial his prior testimony may be admitted if sufficient indicia of reliability are present; the supreme court has upheld the use of a witness's video deposition at trial when the record revealed that the witness was out of the country at the time of the trial.

19. **Witnesses – video-deposition testimony – trial court madecase-specific finding of necessity.** – The trial court specifically found that use of the witness's video deposition at appellant's trial was necessary because the witness was unavailable to testify in person; in doing so, the trial court noted the history of the case, the State introduced into evidence an affidavit signed by the witness that stated that although he was a resident of Texas, his business dealings would take him out of the country most of the year, he would be out of the country on specific scheduled trial dates, and he had no foreseeable plans to return to Arkansas in the near or distant future, he also testified on direct examination by the State that 80% of his life was spent abroad; when the trial court found that the witness was unavailable to testify at trial, it thereby made the case-specific finding of necessity mandated by *Maryland v. Craig*, 497 U.S. 836 (1990).

20. **Evidence – witness unavailable within meaning of hearsay exception – State submitted proof that witness's attendance could not be procured.** – Where the State clearly submitted evidence that the witness was located outside of the United States, where he was not subject to subpoena or other process, the State submitted sufficient proof that they were unable to procure the witness's attendance so as to fall within the hearsay exception found at Ark. R. Evid. 804(a)(5).

21. **Appeal & error – argument not raised below – issue not preserved for appeal.** – The supreme court does not address arguments raised for the first time on appeal.

22. **Witnesses – grant of immunity from prosecution – purpose.** – The granting of immunity is not a constitutional right but only one authorized by statute; the granting of immunity is within the discretion of the prosecutor when in his judgment such a grant of immunity is necessary to the public interest; the purpose of immunity statutes is to aid the prosecution in apprehending criminals by inducing witnesses to testify for the State.

23. **Witnesses – immunity used to induce witness to testify for State – refusal to grant immunity to defense witness not violative of constitution.** – Because the purpose of immunity statutes is to induce witnesses to testify for the State, the supreme court could not say that the trial court violated appellant's constitutional rights by refusing to grant the witness immunity as a defense witness.

24. **Appeal & error – argument contained mere list of purported errors – assignments of error unsupported by convincing authority or apposite authority are not considered on appeal.** – Where appellant's final point on appeal referred the court to "a laundry list" of errors that he argued below at the conclusion of the trial, and he asked the court to reverse on the basis of cumulative error and trial court bias, his claim was barred because none of the individual allegations were supported by argument or authority; assignments of error unsupported by convincing authority or apposite authority will not be considered on appeal. [cme]

Appeal from Pulaski Circuit Court; David Bogard, Judge; affirmed.

Bowden Law firm, by: David O. Bowden; and Tona M. DeMers, for appellant.

Mark Pryor, Att'y Gen., by: James R. Gowen, Jr., Ass't Att'y Gen., for appellee.

Annabelle Clinton Imber, Justice. The appellant, David L. Hale, brings this appeal from his conviction by a jury in Pulaski County Circuit Court for making a false or misleading statement tothe Arkansas Insurance Department in violation of Ark. Code Ann. §§ 23-60-109 (Repl. 1994). The jury sentenced Mr. Hale on that conviction to twenty-one days imprisonment in the Arkansas Department of Correction. Previously, in an interlocutory appeal by Mr.

Hale, we affirmed the circuit court's denial of his motions to dismiss the State's charges against him. *Hale v. State*, 336 Ark. 345, 985 S.W.2d 303 (1999) (*Hale I*). In the present appeal, Mr. Hale raises five points on appeal: (1) there was insufficient evidence to support his conviction for violating Ark. Code Ann. §§ 23-60-109; (2) the trial court erred in not granting his motion to dismiss, when the prosecutor willfully used immunized testimony against him in violation of *Kastigar v. United States*, 406 U.S. 441 (1972); (3) the trial court erred in allowing the State to introduce video-deposition testimony in violation of his Sixth Amendment right of confrontation, Ark. R. Evid. 804, and Ark. Code Ann. §§ 16-44-202 (Repl. 1999); (4) the trial court erred in refusing to compel a witness to testify in his behalf after the witness had been granted immunity from prosecution by the State; and (5) the trial court erred in denying his cumulative-error objection and in exhibiting a hostile attitude toward Mr. Hale and his counsel in violation of his Sixth and Fourteenth Amendment rights to a fair trial and due process of law. We find merit in none of the points raised, and we affirm.

At the trial of this case, the State claimed that in July of 1993 Mr. Hale entered into a complex scheme whereby he caused the president of National Savings Life Insurance Company (NSLIC) to make a false or misleading statement to the Arkansas Insurance Department in violation of Ark. Code Ann. §§ 23-60-109. NSLIC was wholly owned by a holding company, National Savings Corporation (NSC), and Mr. Hale owned 100% of the stock in NSC. Mr. Hale also owned a company called Emanon Marketing Inc. (Emanon), which was the general agency for his insurance business. Joseph Niemann had been hired by Mr. Hale in January 1992 to serve as president for both NSLIC and Emanon.

By letter dated March 17, 1993, the Commissioner of the Arkansas Insurance Department, Lee Douglass, in accordance with Ark.

Code Ann. §§ 23-69-138, notified NSLIC and its president, Mr. Niemann, that NSLIC had a capital deficiency in the amount of $38,757. The letter further advised Mr. Niemann that if the deficiency was not corrected within thirty days after receipt of the letter, Commissioner Douglass had authority, pursuant to Ark. Code Ann. §§ 23-69-138, to suspend NSLIC from soliciting or writing any new coverages in Arkansas until the deficiency was corrected, to deem NSLIC to be insolvent, and to institute delinquency proceedings against NSLIC.

Upon receipt of the March 17, 1993 letter, Mr. Niemann testified that he "took the letter to David Hale and we discussed it." He further stated that "we asked our attorney to meet with the Insurance Commissioner to see if he would grant us an extension to solve the deficiency, which he did."

Mr. Niemann also confirmed that the Insurance Commissioner granted a ninety-day extension of time to cure the deficiency and that Mr. Hale knew about the extension.

Likewise, Mr. Hale testified that "we" decided to get an extension, so they called their attorney, Allan Horne, to handle the matter. Although Mr. Niemann and Mr. Hale both denied that Mr. Hale attended a meeting with the Insurance Commissioner regarding the extension, Commissioner Douglass testified that he met with Mr. Hale and Mr. Horne regarding the extension, and Mr. Hale "sat in my office and told me that he would cure the impairment with a cash infusion and that he was trying to position the company where he could sell it." Thus, Mr. Hale began the process of attempting to cure NSLIC's capital impairment within the extended ninety-day period.

Mr. Hale entered into a series of transactions with George Michael Rutherford of Houston, Texas in 1993. The exact nature of these transactions was in dispute. Mr. Rutherford, along with his wife, Lisa Forbes, and Rebecca Winemiller, controlled an Arkansas company called FSA Financial Systems, Inc. (FSA). Mr. Rutherford testified that in May or June of 1993, he and Mr. Hale began discussions about FSA investing in a company called Med-A-Corp by means of a stock-swap or a preferential buy-out. According to Mr. Rutherford, they eventually agreed to do a stock swap between FSA and Med-A-Corp. He then stated that Mr. Hale "requested to borrow a couple of hundred thousand dollars to complete the deal with Med-A-Corp." Mr. Rutherford noted that he did not have $200,000, but he had just put $150,000 into a company called Ink Jet. Therefore, he agreed to loan Mr. Hale $150,000 from Ink Jet.

Mr. Hale gave a different version of his dealings with Mr. Rutherford. He testified that in 1993 Mr. Rutherford and Ms. Winemiller asked him to invest in FSA through his small business investment company, Capital Management Services, Inc. (CMSI). Although Mr. Hale told them that he could not invest any cash, he offered to let them look at CMSI's investment portfolio. As a result of that offer, they became interested in Med-A-Corp because the inactive company still held patents for "certain kinds of medical computer software." Pursuant to those discussions, Mr. Hale stated that FSA purchased 420 shares of Med-A-Corp from CMSI on March 14, 1993, and paid for those shares by transferring 420 shares of FSA stock to CMSI. Mr. Hale testified that Mr. Rutherford again approached him in May of 1993 about investing in his insurance agency, Emanon. Mr. Hale stated:

> "So he asked me if he bought a ...$150,000 in Emanon, the agency, could the agency buy $150,000 in his company-- "Could" --- he said. "You know", I said, "You can buy $150,000 worth of stock in the insurance company, and the insurance company can buy $150,000 of your stock." ... And it proceeded on to there, and then he kind of -- he made the decision about, oh, first of June, mid-June, and that's when we got Joe Niemann involved, and the stock purchase [agreement] was signed on June the 27th.

In support of Mr. Hale's testimony, the defense introduced into evidence a June 27, 1993 stock purchase agreement signed by Mr. Niemann as president of NSLIC and Lisa Forbes as president of FSA. According to that agreement, FSA agreed to sell and NSLIC agreed to buy 150 shares of $1000 par value preferred stock in FSA.

Shortly thereafter, on July 1 or 2, 1993, Mr. Rutherford directed an employee of Ink Jet to give Mr. Hale a check for $150,000 when he was ready for the money. In the meantime, Mr. Rutherford went to Texas. The State's exhibits, as confirmed by the testimony of Mr. Rutherford, Mr. Hale, and Mr. Niemann, show a series of transactions beginning on Thursday, July 1, 1993, as follows:

July 1, 1993

$150,000 cashier's check from First Commercial Bank made payable to Ink Jet

Deposit slip for $150,000 into an Ink Jet bank account

July 2, 1993

$150,000 check from Ink Jet to Emanon Marketing,Inc., signed by Thomas Quinlan of Ink Jet

Deposit slip for $150,000 into account at Pulaski Bank (Mr. Hale testified that Mr. Niemann deposited the check into the account of Emanon)

$150,000 check from Emanon to NSC, signed by Joe Niemann

Deposit slip for $150,000 into account of NSC

$150,000 check from NSC to NSLIC, signed by David Hale

Deposit slip for $150,000 into account of NSLIC

Mr. Niemann testified that Mr. Hale showed him the check from Ink Jet to Emanon on July 2, 1993, and told him that it should go to NSLIC as a capital contribution. When asked "[w]hat did [Mr. Hale] tell you to do with it[,]" Mr. Niemann stated: "Well, it was obvious it was meant to go to Emanon Marketing to be eventually contributed to National Savings Life Insurance Company." He further confirmed that he deposited the check into Emanon's account "so I could write [NSC] a check so they would in turn contribute the capital to [NSLIC]." He also testified that Mr. Hale told him about his plans for NSLIC to use the money to buy preferred stock in FSA. When Mr. Niemann expressed concern about FSA stock not being an admissible asset, Mr. Hale stated: "Don't worry about it. ... They have the financials to support it, and it will be an admissible asset."

Following NSLIC's receipt of the $150,000 from NSC, Mr. Niemann, as president of NSLIC, signed and sent a letter to the Arkansas Insurance Department on July 6, 1993. That letter stated, in relevant part, as follows:

> Under date of March 17, 1993 we were advised that National Savings Life Insurance Company in accordance with Ark. Code. Annotated 23-69-138(a) had a capital impairment in the amount of $38, 575. Subsequently, you allowed a 90 day extension for the Company to correct this deficiency.
>
> Enclosed you will find a receipted deposit slip in the amount of $150,000 to the savings account of the Company. This is a capital contribution from our parent, National Savings Corporation.
>
> Should you desire any additional information concerning this matter please so advise.

Attached to the letter was a copy of the July 2, 1993 deposit ticket showing that $150,000 was deposited into NSLIC's account. Mr. Niemann testified that he wrote the July 6 letter to the Insurance Commissioner because the $150,000 capital contribution to NSLIC cured the earlier deficiency. With regard to Mr. Hale's involvement in writing the letter, he stated:

> I don't exactly recall whether I said, "We need to write the letter," to David Hale, or whether David Hale said to me, "We need to write the letter." We simply talked about the fact that the Insurance Commissioner had to be advised that -- or should be advised that our deficiency had been solved.

Mr. Niemann also stated that he inferred from his July 2 meeting with Mr. Hale that he needed to write the letter. Mr. Hale acknowledged during his testimony that he was familiar with the letter to the Insurance Commissioner.

It is this July 6, 1993 letter that forms the basis of the State's information charging Mr. Hale with making a false or misleading statement to the Arkansas Insurance Department in violation of Ark. Code Ann. §§ 23-60-109, in conjunction with Mr. Rutherford's testimony regarding (1) a conversation he had with Mr. Hale on July 2, 1993, and (2) Mr. Hale's subsequent return of the $150,000 to Mr. Rutherford on July 6, 1993. Specifically, Mr. Rutherford testified that he could not find any information on Med-A-Corp after he loaned Mr. Hale $150,000 to complete the deal with Med-A-Corp. According to Mr. Rutherford, he called Mr. Hale on July 2, the same day that the $150,000 check from Ink Jet had been delivered to Mr. Hale, and asked him to hold the check and return it when Mr. Rutherford got back to Little Rock the following week. Mr. Hale agreed to return the money as requested. Mr. Rutherford further testified that he returned to Little Rock on Tuesday, July 6, and Mr. Hale gave the money back to him on that date. That transaction is evidenced by the following exhibits introduced by the State at trial, each of which is dated July 6, 1993:

Savings account debit slip signed by Mr. Niemann showing that a $150,000 cashier's check had been written to FSA out of NSLIC's account

$150,000 cashier's check from NSLIC to FSA

Deposit slip for $150,000 into the account of FSA

Mr. Hale denied that Mr. Rutherford ever asked for the $150,000 back and maintained that the $150,000 check to FSA on July 6 was payment for FSA stock as evidenced by the June 27 stock purchase agreement. Based primarily on Mr. Rutherford's testimony, the State asserted below that NSLIC's letter of July 6, which stated that the company's capital deficiency had been cured, was false or misleading and thereby violated section 23-60-109, because the capital deficiency had in fact not been corrected as the letter indicated. In essence, the State charged that Mr. Hale had placed the $150,000 provided by Mr. Rutherford in the account of NSLIC long enough to state in the July 6 letter that the capital deficiency had been cured, and then he returned the money to Mr. Rutherford. The investigation leading up to Mr. Hale's prosecution and conviction began when, by a letter dated September 21, 1993, Mr. Niemann notified the Arkansas Insurance Department that the impairment had not actually been cured on July 6, as the earlier letter had indicated, because "the funds were subsequently invested in a security I believe is a non-admissible asset."1 Based on that notification by Mr. Niemann, the Insurance Commissioner ordered an examination, and the Arkansas Insurance Department petitioned for appointment of a receiver for NSLIC on September 27, 1993. NSLIC was subsequently placed into a receivership under the auspices of the Insurance Commissioner

I. Sufficiency of the Evidence

For his first point an appeal, Mr. Hale challenges the sufficiency of the evidence supporting his conviction. When reviewing the sufficiency of the evidence on appeal, this court does not reweigh the evidence but determines instead whether the evidence supporting the verdict is substantial. *McFarland v. State*, 337 Ark. 386, 989 S.W.2d 899 (1999). Substantial evidence is defined as direct or circumstantial evidence that is forceful enough to compel reasonable minds to reach a conclusion one way or another and that goes beyond mere speculation or conjecture. *Id.; Bailey v. State*, 334 Ark. 43, 972 S.W.2d 239 (1998). In determining whether there is substantial evidence, this court reviews the evidence in the light most favorable to the State. *McFarland v. State, supra*. Only evidence supporting the verdict is considered. *McFarland v. State, supra.* We will affirm if there is any substantial evidence to support the verdict. *Harris v. State*, 331 Ark. 353, 961 S.W.2d 737 (1998).

As a threshold matter, Mr. Hale argues that this court should follow the standard of review set out by the United States Supreme Court in *Jackson v. Virginia*, 443 U.S. 307 (1979), where the Court, in determining whether habeas corpus relief should be granted to a defendant convicted of murder, stated: "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* The State suggests initially that Mr. Hale failed to make this argument below and, therefore, is precluded from raising it on appeal. We note that Mr. Hale's motion for directed verdict incorporated language similar to the above-quoted language in *Jackson v. Virginia*: "no jury could reasonably find that there was proof beyond a reasonable doubt as to the element of intent." Thus, we conclude that Mr. Hale is not barred from arguing on appeal that this court should explicitly adopt *Jackson's* "rational fact-finder test" as the proper standard of review. In that regard, we considered a similar argument in *Jones v. State*, 269 Ark. 119, 598 S.W.2d 748 (1980), and concluded that the language in *Jackson v. Virginia* does not require us "to abandon our decisions regarding the test of whether a jury verdict should stand in a criminal case. There must be substantial evidence to support such a decision." *Id.*, 269 Ark. at 120, 598 S.W.2d at 749. Once again, for the reasons stated in *Jones v. State*, we decline to explicitly adopt *Jackson's* "rational fact-finder test" as the appropriate standard of review when there is a challenge to the sufficiency of the evidence. Accordingly, we will adhere to the substantial-evidence test in reviewing the sufficiency of the evidence in this case.2

With regard to the substance of Mr. Hale's first argument on appeal, we now consider whether there was sufficient evidence to support his conviction for violating section 26-60-109, which states:

> Any person who files any statement, application, form, or other document required to be filed by this code, knowing the statement or information contained in the document to be false or misleading in any material respect, shall be guilty of a felony and upon conviction shall be punished by a fine of not more than five thousand dollars ($5,000) or by imprisonment in the Department of Correction for not more than three (3) years, or by both fine and imprisonment.

Mr. Hale contends that the evidence is insufficient in three respects: (1) the State failed to prove that he filed a document; (2) the State failed to prove that the document was required to be filed by the Insurance Code; and (3) the State failed to prove that he knew the statement to be false or misleading at the time it was filed. We conclude that all of these arguments are without merit.

In making the argument that the State failed to prove that he filed a document, Mr. Hale characterizes Mr. Niemann's memory as "somewhat fuzzy regarding all the events surrounding this matter." With regard to the events leading up to July 6, 1993, when the letter was written to the Arkansas Insurance Department, Mr. Niemann testified as follows:

> Well, it came to be written because the $150,000 capital

> contribution to National Savings Life Insurance Company - it solved the deficiency in the company that was mentioned in the Commissioner's letter that he wrote back in March. ... Well, I wrote the letter because the deficiency had been impaired [sic]. I don't exactly recall whether I said, "We need to write the letter," to David Hale, or whether David Hale said to me, "We need to write the letter." We simply talked about the fact that the Insurance Commissioner had to be advised that - or should be advised that our deficiency had been solved.

Mr. Hale asserts there was no evidence that he instructed Mr. Niemann to write the July 6 letter. That assertion fails to acknowledge Ark. Code Ann. §§ 5-2-503(a) (Repl. 1997), which provides that :

> A person is criminally liable for any conduct constituting an offense that he performs or *causes* to be performed in the name of or in behalf of an organization to the same extent as if that conduct were performed in his own name or behalf.

(Emphasis added.) Thus, the issue here is whether there is substantial evidence that Mr. Hale caused the document to be filed with the Arkansas Insurance Department. Mr. Niemann testified unequivocally that Mr. Hale knew about the letter before it was filed. Indeed, Mr. Hale acknowledged during his testimony that he was familiar with the letter. Furthermore, Mr. Hale was the owner of NSLIC and was the only person directing the events that caused $150,000 to be deposited into NSLIC's account, thereby triggering the need to notify the Insurance Department that the deficiency had been cured. According to Commissioner Douglass' testimony, Mr. Hale came to see him to ask for an extension of time to cure NSLIC's capital deficiency and told him that he was going to cure the deficiency by means of a "cash infusion." Subsequently, Mr. Hale entered into negotiations with Mr. Rutherford, which resulted in $150,000 being deposited into NSLIC's account on July 2. Once

Mr. Hale received the $150,000check from Mr. Rutherford, Mr. Hale directed Mr. Niemann to put the money into NSLIC's account as a "capital contribution." That infusion of cash into NSLIC came about solely as a result of Mr. Hale's dealings with Mr. Rutherford, and, without it, the July 6 letter to the Insurance Commissioner would not have been written and filed with the Arkansas Insurance Department. This evidence directly supports the conclusion that Mr. Hale caused the filing of the July 6 letter and, therefore, was ultimately responsible to the same extent as if he had filed the letter himself.

Mr. Hale next contends that the filing of the July 6 letter with the Insurance Department was not required by the Insurance Code. He is clearly mistaken. The meaning of the term "this code" as used in section 23-60-109 is defined in the note to Ark. Code Ann. §§ 23-60-101 (Repl. 1994) to include sections 23-69-105--23-69-141. Thus, "this code" includes Ark. Code Ann. §§ 23-69-138(c) (Repl. 1994), which provides in relevant part:

> If the deficiency is not made good and proof thereof filed with the commissioner within the thirty-day period, the insurer shall be deemed insolvent and the commissioner shall institute delinquency proceedings against it...."

The plain language of section 23-69-138(c) required the filing of the July 6 letter. Moreover, Commissioner Douglass testified that the July 6 letter advising the Insurance Department that the capital deficiency had been cured was "a statutory requirement ofcuring the impairment," and Mr. Hale admitted during his own testimony that he knew of the "requirement" that the Insurance Department be notified when NLSIC's capital deficiency was cured.

Finally, Mr. Hale argues that the State failed to prove that he knew the statements contained in the July 6 letter were false at the time the letter was mailed on July 6, 1993. Mr. Hale fails to recognize that Ark. Code Ann. §§ 23-60-109 allows the jury to convict if the information contained in a document is either false or misleading in any material respect. The July 6 letter from NSLIC to the Insurance Department noted NSLIC's capital impairment in the amount of $38,575 and then stated that $150,000 had been deposited into the savings account of the company, thereby purportedly indicating that the capital impairment had been cured. However, Mr. Rutherford testified that he gave Mr. Hale the check for $150,000 on July 2 and then called Mr. Hale later that same day and asked him to return the money. According to Mr. Rutherford, Mr. Hale agreed during that phone call on July 2 to return the $150,000 to him during the week after the July 4 holiday. This evidence shows that Mr. Hale knew when the July 6 letter was sent to the Insurance Department that (a) he was going to have to return the $150,000 to Mr. Rutherford sometime during that week, and (b) NSLIC's capital impairment had not been cured. For these reasons, we hold that the evidence supporting Mr. Hale's conviction for violating Ark. Code Ann. §§ 23-60-109 is substantial.

II. Kastigar *Doctrine*

For his second point on appeal, Mr. Hale contends that the State committed two violations of the doctrine of *Kastigar v. United States,* 406 U.S. 441 (1972). In his previous interlocutory appeal to this court, Mr. Hale challenged the State's ability to prosecute him due to his plea agreement with the Independent Counsel for the Department of Justice, in which the Independent Counsel granted Mr. Hale immunity. *Hale v. State*, 336 Ark. 345, 985 S.W.2d 303 (1999). Although our opinion in *Hale I* upheld the trial court's ruling that the State had not violated *Kastigar v. United States*, we issued a warning:

> In reaching this conclusion, however, we admonish, as the trial court correctly did, that the Kastigar issue continues throughout the trial and prevents the State from impermissibly using any of Mr. Hale's immunized testimony, or the evidence derived therefrom, at any point in the state proceeding.

Hale v. State, 336 Ark. at 358 , 985 S.W.2d at 309. Mr. Hale now contends that the State impermissibly used his immunized federal testimony on two occasions.

We have thoroughly summarized *Kastigar v. United States* and its progeny in *Hale I.* Once the defendant demonstrates that he has testified under a grant of immunity from one sovereign, another sovereign may nevertheless prosecute the defendant for related crimes so long as the prosecutor sustains the heavy burden of proving that its evidence was derived from a legitimate source wholly independent of the compelled testimony. *Hale v. State, supra.* One sovereign's right to prosecute those persons who violate its criminal laws is not thwarted or diminished by another sovereign's grant of immunity. However, the prosecuting sovereign may not use, directly or indirectly, the immunized testimony or any fruits from it. *Hale v. State, supra* (citing *United States v. First Western State Bank*, 491 F.2d 780 (8th Cir. 1974)). The defendant need only show that he testified under a grant of immunity. After that, the burden shifts to the prosecution to prove that all of the evidence it proposes to use was derived from "legitimate independent sources". *Hale v. State, supra.*

In this appeal, Mr. Hale contends that a *Kastigar* violation occurred when excerpts from his immunized grand-jury testimony were discovered in the Little Rock Police Department case file. Upon discovering the excerpts in the police file, Mr. Hale moved for a *Kastigar* determination, and the trial court held a hearing on March 16, 1999. The following day, the trial court issued an order denying Mr. Hale's *Kastigar* motion and refusing to dismiss the case. In doing so, the trial court found that there was no showing by the prosecution that the immunized grand-jury testimony was used in any way and that the testimony contained in the police file did not bear any relationship to the charges in the present case .

Floyd Strayer of the Little Rock Police Department, who investigated David Hale's case, testified that they did not see or use the grand-jury testimony in any way. The trial court apparently believed this testimony. We will not second-guess such credibility determinations. *Hale v. State, supra.*

Mr. Hale also contends that another *Kastigar* violation occurred when he took the stand in his own defense and was cross-examined by the State. During that cross-examination, Mr. Hale asserts the prosecutor impermissibly used his immunized testimony in the federal proceeding as impeachment material.

As Mr. Hale states in his brief, a review of the cross-examination reveals that the prosecutor possessed an intimate and detailed knowledge of the contents of Mr. Hale's federal testimony and that the prosecutor based a large portion of his cross-examination upon the federal testimony. While conceding that many of the questions asked by the prosecutor "directly referenced [Mr. Hale's] testimony in federal court," the State contends that Mr. Hale's argument is procedurally barred from appellate review because he did not make a contemporaneous objection.

We have frequently held that a contemporaneous objection must be made to the trial court before we will review an alleged error on appeal. *Jones v. State*, 340 Ark. 390, 10 S.W.3d 449 (2000) (holding that the appellant's argument was barred because he did not object to the introduction of certain character evidence until after two witnesses had already so testified). In order to properly preserve an issue for appeal, the defendant must timely object at the first opportunity and renew his objection each time the witness is questioned about the matter. *Smallwood v. State*, 326 Ark. 813, 935 S.W.2d 530 (1996) (holding that the issue was not preserved because the defense counsel waited until after the witness had answered the question once and the State had asked the question a second time before objecting); *Hill v. State*, 285 Ark. 77, 685 S.W.2d 495 (1985) (holding the issue was not preserved because the appellant allowed the State to ask the objectionable question eight times in various forms before finally objecting). In the instant case, the prosecutor's first question regarding Mr. Hale's federal testimony occurred on page 2224 of the record, without objection. The prosecutor continued to question Mr. Hale about his federal testimony time and time again, until finally, on page 2247 of the record, defense counsel made the *Kastigar* objection. Based upon this record, the *Kastigar* issue is not preserved due to the lack of a contemporaneous objection.

Mr. Hale argues that a contemporaneous objection is not required when the *Kastigar* doctrine is at issue because *Kastigar* motions may be raised before, during, or after trial. It is true that the issue in *Kastigar v. United States* arose before trial, and in *United States v. McDaniel,* 482 F.2d 305 (8th Cir. 1973) the issue was raised post-trial. However, neither case establishes an exception to our contemporaneous-objection rule. This court has previously noted that the defendant's rights under *Kastigar* were preserved by defense counsel making the "appropriate objections" at trial. *Young v. State*, 316 Ark. 225, 871 S.W.2d 373 (1994).

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We view the present situation much like those cases in which a motion in limine was filed prior to the trial. When such a pretrial motion is denied, the issue is preserved for appeal and no further objection at trial is needed. *Neal v.State*, 320 Ark. 489, 898 S.W.2d 440 (1995); *Massengale v. State*, 319 Ark. 743,894 S.W.2d 594 (1995); *Dalyrymple v. Fields*, 276 Ark. 185, 633 S.W.2d 362 (1982); *Ward v. State*, 272 Ark. 99, 612 S.W.2d 118 (1981). Here, Mr. Hale made a pretrial *Kastigar* motion that was denied. That motion involved certain excerpts of his immunized grand-jury testimony that were found in the Little Rock Police Department file. Nothing in Mr. Hale's pretrial *Kastigar* motion related to the federal testimony used by the prosecutor during his cross-examination of Mr. Hale at trial. This court has held that "failure to object at trial precludes the party from relying on anything disclosed at trial which was not brought out at the pre-trial hearing." *Sutton v. State*, 311 Ark. 435, 844 S.W.2d 350 (1993). Because the use of Mr. Hale's federal testimony on cross-examination was not within the scope of his pretrial *Kastigar* motion, a timely and contemporaneous objection at trial was necessary.

Even if we were to conclude that our admonition in *Hale I* could be interpreted as a favorable ruling that prohibited the State from impermissibly using any of Mr. Hale's immunized federal testimony at any point in the proceeding, it would still be necessary for Mr. Hale to make a contemporaneous objection to the prosecutor's repeated use of the immunized federal testimony in order to preserve the issue for appellate review. The reason is that the trial judge must be given an opportunity to timely correct the mistake. *Johnson v. State*, 308 Ark. 7, 823 S.W.2d 800 (1992). Otherwise, if a contemporaneous objection is not made at the time the evidence is offered during the jury trial, the proverbial bell will have been rung and the jury prejudiced. *Stewart v. State*, 332 Ark. 138, 964 S.W.2d 793 (1998). When a defendant successfully objects to a question on the basis of hearsay, and the same or similar question is later asked, the defendant must renew his objection or else the initial objection is waived. *Marvel v. Parker*, 317 Ark. 232, 878 S.W.2d 364 (1994). There is no affirmative duty on a trial court to subsequently make evidentiary rulings on its own motion. *Mills v. State*, 321 Ark. 621, 906 S.W.2d 674 (1995); *Friar v. State*, 313 Ark. 253, 854 S.W.2d 318 (1993).

The dissent acknowledges that we do not follow the "plain error" rule, under which plain errors affecting substantial rights may be noticed although they are not brought to the attention of the trial court. *Lovelady v. State*, 326 Ark. 196, 931 S.W.2d 430 (1996). Moreover, we have stated on numerous occasions that even constitutional arguments are waived on appeal unless raised below. *Friar v. State, supra*. In its valiant effort to overcome this court's longstanding adherence to the contemporaneous-objection rule, the dissent submits that the trial court had a duty to intervene and prevent a *Kastigar* violation under one of the exceptions to our objection requirement listed in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). That exception, however, is based on obiter dicta and no judgment has ever been reversed on account of a trial court's failure to intervene on its own motion. *Id.* Furthermore, as we stated in *Lovelady v. State*, "we have never held that a trial court has a duty to declare a mistrial on its own motion when a prosecutor calls a witness in violation of a privilege ..." 326 Ark. at 199, 931 S.W.2d at 432. In any event, the exception is limited to the trial court's duty to intervene and correct a serious error "either by an admonition to the jury or by ordering a mistrial." *Wicks v. State*, 270 Ark. at 786, 606 S.W.2d at 369. Here, the prosecutor cross-examined Mr. Hale extensively about his federal testimony before defense counsel interposed a *Kastigar* objection. At that point, instead of asking for an admonition to the jury or a mistrial, the defense counsel moved for dismissal of the charges. Under these circumstances, it is clear that this case does not come within the *Wicks* exception cited by the dissent.

Finally, based upon the colloquy that took place when defense counsel finally did object to the prosecutor's use of Mr. Hale's immunized testimony, the dissent and the concurrence both suggest that the trial court may not have known this was a *Kastigar* violation. That is exactly the reason for our contemporaneous-objection rule; when the trial judge does not know that an error has occurred, it is the aggrieved party's duty to promptly object so that the trial judge is afforded an opportunity to timely correct the mistake. *Johnson v. State, supra*. This was not done.

III. Video-deposition testimony

For his third point on appeal, Mr. Hale relies upon three distinct arguments. First, he argues that the use of Mr. Rutherford's video-deposition testimony at trial violated his constitutional right to be confronted with the witnesses against him as guaranteed by the 6th Amendment to the United States Constitution and Article 2, section 10, of the Arkansas Constitution. Second, he argues that the use of video-deposition testimony was erroneous because Mr. Rutherford was not unavailable pursuant to Ark. R. Evid. 804(b)(1). Finally, he contends that the State failed to follow the procedure established by Ark. Code Ann. §§ 16-44-201.

This court has consistently interpreted the Confrontation Clauses of the United States and Arkansas Constitutions to provide identical rights. *Smith v. State*, 340 Ark. 116, 8 S.W.2d 534 (2000). Here, Mr. Hale asserts that his Confrontation Clause rights were violated by the use of a video deposition because he was not able to meet the witness face-to-face. We recently summarized the seminal United States Supreme Court cases on this issue as follows:

> The United States Supreme Court held in *Coy v. Iowa*, 487 U.S. 1012 (1988), that "the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact." Two years later, the Court held that the Confrontation Clause does not guarantee criminal defendants an absolute right to a face-to-face meeting with witnesses against them at trial. *Maryland v. Craig*, 497 U.S. 836 (1990). The Court further held that the right to confront accusatory witnesses may be satisfied absent a physical, face-to-face confrontation at trial only where the trial court makes a case-specific finding that the denial of such confrontation is necessary to further an important public policy ... and only where the reliability of the testimony is otherwise assured. Id.

Smith v. State, supra. Mr. Hale contends that because the denial of face-to-face confrontation is not necessary in this case, the trial court erred in allowing the use of a video deposition. We disagree.

The trial court specifically found that the use of Mr. Rutherford's video deposition at Mr. Hale's trial was necessary because the witness was unavailable to testify in person. In doing so, the trial court noted the history of the case: "They've had to fly this [witness] back from Africa twice for this trial." The State introduced into evidence an affidavit signed by Mr. Rutherford, which stated that although he was a resident of Texas, his business dealings take him out of the country most of the year, he would be in Africa or Great Britain on specific scheduled trial dates, and he had no foreseeable plans to return to Arkansas in the near or distant future. Mr. Rutherford also testified on direct examination by the State that 80% of his life is spent abroad. Courts have consistently allowed the use of video depositions in similar circumstances where the witness was shown to be unavailable. *United States v. Mueller*, 74 F.3d 1152 (11th Cir. 1996) (where the witness was unavailable because he lived in London, England); *United States v. Gifford*, 892 F.2d 263 (3d Cir. 1989) (where the witnesses were located in Belgium and the government was unable to procure their attendance at trial); *United States v. Kelley*, 892 F.2d 255 (3d Cir. 1989) (where the witnesses were foreign nationals unwilling to travel to the United States for trial); *United States v. Salim*, 855 F.2d 944 (2d Cir. 1988) (where the witness was being held in custody by French police). "[I]t has been held that when a witness is actually unavailable at trial his prior testimony may be admitted if sufficient indicia of reliability are present." *United States v. Benfield*, 593 F.2d 815 (8th Cir. 1979) (citing *Mancusi v.Stubbs* , 408 U.S. 204 (1972) and *Barber v. Page*, 390 U.S. 719 (1968)). Likewise, this court has upheld the use of a witness's video deposition at trial when the record revealed that the witness was in London, England at the time of the trial. *Verdict v. State*, 315 Ark. 436, 868 S.W.2d 443 (1993). In this case, when the trial court found that the witness was unavailable to testify at trial, it thereby made the case-specific finding of necessity mandated by *Maryland v. Craig*, 497 U.S. 836 (1990).

Mr. Hale also argues that the deposition should not be allowed because Mr. Rutherford was not unavailable so as to fall within the hearsay exception found at Ark. R. Evid. 804(b)(1) for former testimony. We disagree. Ark. R. Evid. 804(a)(5) states that a witness is unavailable if he "[i]s absent from the hearing and the proponent of his statement has been unable to procure his attendance ... by process or other reasonable means." Mr. Hale does not dispute that Mr. Rutherford was absent from the hearing. Rather, he contends that the State did not make a sufficient showing that they were unable to procure Mr. Rutherford's attendance by process or other reasonable means. However, the State clearly submitted evidence that Mr. Rutherford was located outside of the United States, where he was not subject to subpoena or other process. In *United States v. Kelley*, the appellant raised an identical argument after the trial court admitted the deposition of witnesses located in Europe. The Eight Circuit Court of Appeals stated: "[w]e conclude that since the government had no power to compel the witnesses to attend, it adopted a reasonable solution when it deposed them in Europe." *United States v. Kelley, supra.* Accordingly, the State submitted sufficient proof that they were unable to procure Mr. Rutherford's attendance.

Finally, Mr. Hale argues that the State failed to follow the procedure set forth in Ark. Code Ann. §§ 16-44-201. However, that argument is not preserved for appeal because it was not raised below. We do not address arguments raised for the first time on appeal. *Dodson v. State*, 341 Ark. 41, 14 S.W.3d 489 (2000). In his arguments below, Mr. Hale asserted a violation of section 16-44-202.7

IV. Immunity -- Defense Witness

Prior to trial, the State granted Rebecca Winemiller, a principal in FSA, immunity from prosecution in exchange for her cooperation with the State in this case. Pursuant to that grant of immunity, Ms. Winemiller gave a statement to the Little Rock Police Department concerning the circumstances surrounding a loan of $150,000 by FSA to Ink Jet at the request of Mr. Rutherford. At trial, the State did not call Ms. Winemiller as a witness. However, Mr. Hale subpoenaed her and sought to call her as a defense witness at trial, whereupon Ms. Winemiller asserted her constitutional right against self-incrimination under the Fifth Amendment. After hearing arguments from both sides, the trial court ruled that she would be allowed to assert her Fifth Amendment rights and refused to compel her to testify. The trial court further found that the State's grant of immunity to Ms. Winemiller would not serve to protect her if she were called as a defense witness. On appeal, Mr. Hale argues that the trial court erred in so holding and that the trial court's ruling violated his constitutional rights to due process, equal protection, a fair trial, and compulsory process.

Mr. Hale's basic contention is that the trial court should have compelled Ms. Winemiller to testify by holding that the State's grant of immunity to the witness also extended to the defense's use of her testimony. We disagree. In *Fears v. State*, 262 Ark. 355, 556 S.W.2d 659 (1977), the defendant asked the trial court to grant, or require the State to grant, immunity to a defense witness. The trial court refused to do so, and this court affirmed, stating:

> The granting of immunity is not a constitutional right but only one authorized by statute. ... [T]he grantingof immunity is within the discretion of the prosecutor when in his judgment such a grant of immunity is necessary to the public interest. The purpose of immunity statutes is to aid the prosecution in apprehending criminals by inducing witnesses to testify for the State.

Id.; *See* Ark. Code Ann. §§ 16-43-605 (Repl. 1999). Likewise, in *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997), a criminal defendant argued that his due process and equal protection rights were violated by the trial court's refusal to grant immunity to a defense witness. We restated our holding in *Fears v. State*, and affirmed. Our holdings in *Williams v. State* and *Fears v. State* were recently reaffirmed in *Tabor v. State*, 333 Ark. 429, 971 S.W.2d 227 (1998). Because immunity statutes are for the purpose of inducing witnesses to testify for the State, we cannot say that the trial court violated Mr. Hale's constitutional rights by refusing to grant Ms. Winemiller immunity as a defense witness.

V. Cumulative Error

In his final point on appeal, Mr. Hale refers this court to "a laundry list" of errors that he argued below at the conclusion of the trial, and he asks this court to reverse on the basis of cumulative error and trial court bias. The State contends that this claim is barred because none of Mr. Hale's individual allegations are supported by argument or authority. We agree. Mr. Hale does nothing more than list the trial court's actions with which he takes issue. It is well settled that assignments of error unsupported by convincing authority or apposite authority will not be considered on appeal. *Williams v. State*, 329 Ark. 8, 946 S.W.2d 678 (1997).

Affirmed.

Brown, J., concurs.

Thornton, J., dissents.

Robert L. Brown, Justice, concurring. I agree with much of what is said in Justice Thornton's dissent. This court took pains to be exceedingly clear in *Hale v. State*, 336 Ark. 345, 985 S.W.2d 303 (1999) (*Hale I*), that the State could not use any of Hale's immunized testimony in his trial for filing false documents with the State Insurance Department. Yet, that is precisely what the prosecutor did at trial. He used Hale's immunized testimony from the Tucker trial in his cross-examination. This was in direct violation of our admonishment in *Hale I*.

My problem with the dissent is that it invokes a *Wicks* exception relating to the trial court's duty to intervene to correct a serious error even when no objection has been made by counsel. *See Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). In my opinion, the trial judge should haveknown that what the prosecutor was doing with Hale's immunized testimony at trial constituted a *Kastigar* violation. *See Kastigar v. United States*, 406 U.S. 441 (1972). But from the colloquy quoted in the dissent, the trial judge apparently did not know that *Kastigar* was being violated by use of the immunized testimony. It appears from the colloquy that the trial judge believed that if the immunized testimony being used did not relate to the charge for which Hale was being tried, a *Kastigar* violation did not occur.

I cannot hold the trial judge responsible for correcting a serious error *on his own motion* when the judge was not aware an error had been committed. Thus, I agree with the majority that the onus was on Hale's defense counsel to bring the issue to the trial court's attention by timely objection.

Ray Thornton, Justice, dissenting. I respectfully dissent from the majority opinion. The United States Supreme Court made it clear in *Kastigar v. United States*, 406 U.S. 441 (1972), that any later use of immunized testimony is prohibited. This is the second time we have addressed the application of *Kastigar* to this case. In our previous decision, we specifically noted that "we admonish, as the trial court correctly did, that the *Kastigar* issue continues throughout the trial and prevents the State from impermissibly using any of Mr. Hale's immunized testimony, or the evidence derived therefrom, at any point in the State proceeding." *Hale v. State*, 336 Ark. 345, 985 S.W.2d 303 (1999). When this case was returned to the trial court, the State violated the rule established in *Kastigar* by asking Mr. Hale questions involving his immunized testimony, notwithstanding our instruction against doing so. The trial court did not prohibit the use of this immunized testimony, but allowed the questioning to proceed. There was no immediate objection to this improper use of the testimony by defense counsel. However, as the questioning proceeded, defense counsel did object. This objection was overruled by the trial court. Under these circumstances, I believe that the trial court erred in permitting the use of such protected evidence. In my view, this should settle the matter. I would reverse the case based on the use of immunized testimony protected by *Kastigar*.

The majority concludes that we cannot reach this issue because the defense counsel failed to make a contemporaneous objection to the improper questioning. In so concluding, the majority is disregarding our holdings in previous cases which outline various exceptions to the plain-error rule. This court has consistently and uniformly eschewed review of plain error in appeals from the trial courts of this State. But we have also adhered to four very limited exceptions to our plain-error rule, which were listed in *Wicks v. State*, 270 Ark. 781, 606 S.W.2d 366 (1980). In *Wicks*, one of those exceptions read:

A third exception is a mere possibility, for it has not yet occurred in any case. That relates to the trial court's duty to intervene, without an objection, and correct a serious error either by an admonition to the jury or by ordering a mistrial.

270 Ark. at 786, 606 S.W.2d at 369. That, without question, is the situation in the instant case. The trial court had a duty to intervene and prevent a *Kastigar* violation, when this court had made it perfectly clear that Hale's immunized testimony was off limits in the trial. This is particularly true since the trial court was well aware of potential *Kastigar* problems. The trial court had held one *Kastigar* hearing which led to our decision in *Hale I* over the prosecutor's suspected use of Hale's testimony. In the case now before us, a second pretrial motion was filed which resulted in a hearing. The motion alleged that a *Kastigar* violation occurred when portions of Hale's grand jury testimony were found in the Little Rock Police Department files. With this background of familiarity with the prohibition against the use of immunized evidence under the *Kastigar* rule, the trial court was not blind-sided when the prosecutor began a third violation of *Kastigar* by cross-examining Hale with a transcript of his immunized testimony from the Tucker trial. The trial court had the duty to intervene under the *Wicks* exceptions as soon as the State began using the immunized testimony. Further, when the violation of *Kastigar* was objected to by Hale, the trial court should have either given an admonition to the jury or declared a mistrial.

The record shows that when defense counsel did object to the prosecutor's use of Hale's immunized testimony from the Tucker trial, this colloquy took place:

Defense Counsel: And we would move that the charges be dismissed based on Kastigar at this time because, clearly, this has been used -- this testimony has been used that was immunized, and it has been used as (*sic*) for a purpose in this trial.

Prosecutor: He's not being tried for this, and it's used to impeach --

The Court: He's not being tried for this.

Defense Counsel: Well, it's not just -- it's not -- it's for any purpose so to correct the investigation for impeachment and use at trial.

The Court: That's denied.

Defense Counsel: And I figured that would be the answer of the Court in view of the position that has been in the past, but I needed to make my record. I needed to make it contemporaneously. And I apologize otherwise for interrupting.

Prosecutor: Well, it (*sic*) you wanted it to be a contemporaneous objection, it should have been when I walked up there with the testimony and he was going --

The Court: Oh, I understand. I understand.

Defense Counsel: I thought he was going to go to the --

The Court: It's denied. Mr. Finkelstein [prosecutor], let's don't belabor this too much longer. Okay?

What the colloquy establishes is that the trial court did not recognize its duty to prevent the use for any purpose of prohibited immunized testimony. I would reverse this case because the trial court failed to take any actions to prevent the jury's consideration of this inadmissible testimony, and because the trial court did not, upon objection, correct the serious error by giving an admonition to the jury, or by ordering a mistrial.

I certainly support this court's longstanding adherence to the contemporaneous-objection rule. But here, where the prosecutor was flouting this court's order against use of immunized testimony, the trial court as well as defense counsel had a duty to step in and correct the serious error under *Wicks v. State, supra.* Few principles of criminal jurisprudence are as sacrosanct as the right against self-incrimination. Because of this breach, Hale was not given a fair trial. I would reverse and remand for a new trial. For that reason, I respectfully dissent.

1 Mr. Nieman testified that he caused the July 6 cashier's check for $150,000 to be issued to FSA pursuant to the instructions of Mr. Hale and on the understanding that the$150,000 was to constitute payment for FSA stock. However, in August of 1993, when no FSA stock certificates or financials were received by NSLIC to show that the FSA stock was an admissible asset, Mr. Niemann began to get worried. He then spoke to Mr. Hale about his concerns on September 21 or 22 and told Mr. Hale that "I didn't feel like the $150,000 was an admissible asset and that I needed to advise the Insurance Department that we had not solved the impairment on our capital ... deficiency." Mr. Hale responded: "You've got to do what you've got to do." Accordingly, Mr. Niemann wrote the letter, dated September 21, to the Arkansas Insurance Department. In Mr. Hale's version of these events, he states that he knew about the letter, but did not meet with Mr. Niemann about it. He said that he and Mr. Niemann merely discussed the fact that FSA had become worried about NSLIC and wanted to "back out" of the stock purchase agreement.

2 The State also suggests that Mr. Hale fails to argue on appeal, as he did at trial, that his conviction is not supported by substantial evidence. We disagree. Mr. Hale contends on appeal that neither the rational fact-finder test nor the substantial-evidence test has been met in this case.

3 The trial court found that Mr. Hale's grand-jury testimony was given under "a grant of full transactional immunity."

4 Mr. Hale was shown a transcript of the testimony he gave at his federal sentencing hearing and at Jim Guy Tucker's trial in federal

court. Although the State has argued otherwise for the first time at oral argument, both parties have consistently assumed, beginning with *Hale I*, that Mr. Hale's testimony in the federal proceedings was compelled testimony. This court made a similar assumption in *Hale I.*

5 According to the State's brief, the State asked Mr. Hale 135 questions before he lodged an objection based upon a *Kastigar* violation.

6 ...

...The dissent takes strong exception to the prosecutor "flouting" this court's admonition in *Hale I.* In doing so, the dissent actually relies upon our law-of-the-case doctrine that has never been argued in this case. Although Mr. Hale argues on appeal that the prosecutor's use of his immunized testimony was prosecutorial misconduct, that argument is not preserved for appeal because it was not raised below. *Tucker v. State*, 336 Ark. 244, 983 S.W.2d 956 (1999).

7 On appeal, Mr. Hale has not argued section 16-44-202. He mentions the section in his point on appeal, but then makes no argument regarding it. Thus, that argument has been abandoned on appeal.

OFFICE OF THE CLERK
SUPREME COURT OF ARKANSAS
COURT OF APPEALS
JUSTICE BUILDING
625 MARSHALL STREET
LITTLE ROCK, ARKANSAS 72201

JANUARY 18, 2001

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Re: CR99-985 David Hale v. State of Arkansas

Gentlemen: (sic)

The Supreme Court made the following order in the above-styled case today:

"Petition for rehearing is denied. Hannah, J. not participating.

Sincerely,

S/ Leslie W. Steen, Clerk

APPLICABLE STATUTES, REGULATIONS AND CONSTITUTIONAL PROVISIONS

CONSTITUTION OF THE UNITED STATES:

ARTICLE VI, SECTION 2:

[2.] This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

AMENDMENT V.

No person shall be . . . subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT VI.

In all criminal prosecutions the accused shall enjoy the right to . . . be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV.

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof; are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Arkansas Code Annotated §23-60-109.

Penalty for false or misleading statements.

Any person who files any statement, application, form, or other document required to be filed by this [Insurance] code, knowing the statement or information contained in the document to be false or misleading in any material respect, shall be guilty of a felony and upon conviction shall be punished by a fine of not more than five thousand dollars ($5,000), or by imprisonment in the state penitentiary for not more than three (3) years, or by both fine and imprisonment.

Arkansas Code Annotated §5-1-112.

Affirmative defense - Former prosecution for same offense.

A former prosecution is an affirmative defense to a subsequent prosecution for the same offense under any of the following circumstances:

(2) The former prosecution resulted in a conviction. There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside and which is capable of supporting a judgment, or a plea of guilty or nolo contendere accepted by the court.

(3) The former prosecution was terminated without the express or implied consent of the defendant after the jury was sworn or, if trial was before the court, after the first witness was sworn, unless the termination was justified by overruling necessity.

Arkansas Code Annotated § 5-2-203.

Culpable mental states - Interpretation of statutes.

(a) If a statute defining an offense prescribes a culpable mental state and does not clearly indicate that the culpable mental state applies to less than all the elements of the offense, the prescribed culpable mental state applies to each element of the offense.

(b) Except as provided in § 5-2-204 (2), if the statute defining an offense does not prescribe a culpable mental state, culpability is nonetheless required and is established only if a person acts purposely, knowingly, or recklessly.

Arkansas Code Annotated § 5-2-402.

Liability for conduct of another generally.

A person is criminally liable for the conduct of another person when:

(3) Acting with the culpable mental state sufficient for the commission of the offense, he causes another person to engage in conduct that would constitute an offense but for a defense available to the other person.

18 USC §. 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to -

- (1) a court or grand jury of the United States,
- (2) an agency of the United States, or
- (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House, and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

18 USC § 6004. Certain administrative proceedings

- (a) In the case of any individual who has been or who may be called to testify or provide other information at any proceeding before an agency of the United States, the agency may, with the approval of the Attorney General, issue, in accordance with subsection (b) of this section, an order requiring the individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this title.

- (b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment -
  - (1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

6002 of this title.

- (b) An agency of the United States may issue an order under subsection (a) of this section only if in its judgment -
  - (1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

28 USC §. 592.

Preliminary investigation and application for appointment of an independent counsel

- (a) Conduct of Preliminary Investigation. -
  - (1) In general. - A preliminary investigation conducted under this chapter shall be of such matters as the Attorney General considers appropriate in order to make a determination, under

subsection (b) or (c), on whether further investigation is warranted, with respect to each potential violation, or allegation of a violation, of criminal law. The Attorney General shall make such determination not later than 90 days after the preliminary investigation is commenced, except that, in the case of a preliminary investigation commenced after a congressional request under subsection (g), the Attorney General shall make such determination not later than 90 days after the request is received. The Attorney General shall promptly notify the division of the court specified in section 593(a) of the commencement of such preliminary investigation and the date of such commencement.

- (2) Limited authority of attorney general. - (A) In conducting preliminary investigations under this chapter, the Attorney General shall have no authority to convene grand juries, plea bargain, grant immunity, or issue subpoenas.
- (B)
    - (i) The Attorney General shall not base a determination under this chapter that information with respect to a violation of criminal law by a person is not specific and from a credible source upon a determination that such person lacked the state of mind required for the violation of criminal law.
    - (ii) The Attorney General shall not base a determination under this chapter that there are no reasonable grounds to believe that further investigation is warranted, upon a

determination that such person lacked the state of mind required for the violation of criminal law involved, unless there is clear and convincing evidence that the person lacked such state of mind.

- (3) Extension of time for preliminary investigation. - The Attorney General may apply to the division of the court for a single extension, for a period of not more than 60 days, of the 90-day period referred to in paragraph (1). The division of the court may, upon a showing of good cause, grant such extension.

- (c) Determination That Further Investigation is Warranted. -

  - (1) Application for appointment of independent counsel. - The Attorney General shall apply to the division of the court for the appointment of an independent counsel if -

    - (A) the Attorney General, upon completion of a preliminary investigation under this chapter, determines that there are reasonable grounds to believe that further investigation is warranted; or

    - (B) the 90-day period referred to in subsection (a)(1), and any extension granted under subsection (a)(3), have elapsed and the Attorney General has not filed a notification with the division of the court under subsection (b)(1). In determining under this chapter whether reasonable grounds exist to warrant further investigation, the Attorney General shall comply with the written or other established policies of the Department of Justice with respect to the conduct of criminal investigations.

- (2) Receipt of additional information. - If, after submitting a notification under subsection (b)(1), the Attorney General receives additional information sufficient to constitute grounds to investigate the matters to which such notification related, the Attorney General shall -
  - (A) conduct such additional preliminary investigation as the Attorney General considers appropriate for a period of not more than 90 days after the date on which such additional information is received; and (B) otherwise comply with the provisions of this section with respect to such additional preliminary investigation to the same extent as any other preliminary investigation under this section.
- (d) Contents of Application. - Any application for the appointment of an independent counsel under this chapter shall contain sufficient information to assist the division of the court in selecting an independent counsel and in defining that independent counsel's prosecutorial jurisdiction so that the independent counsel has adequate authority to fully investigate and prosecute the subject matter and all matters related to that subject matter.
- (e) Disclosure of Information. - Except as otherwise provided in this chapter or as is deemed necessary for law enforcement purposes, no officer or employee of the Department of Justice or an office of independent counsel may, without leave of the division of the court, disclose to any individual outside the Department of Justice or such office any notification, application, or any other document,

materials, or memorandum supplied to the division of the court under this chapter. Nothing in this chapter shall be construed as authorizing the withholding of information from the Congress.

- (f) Limitation on Judicial Review. - The Attorney General's determination under this chapter to apply to the division of the court for the appointment of an independent counsel shall not be reviewable in any court.
- (g) Congressional Request. -
  - (1) By judiciary committee or members thereof. - The Committee on the Judiciary of either House of the Congress, or a majority of majority party members or a majority of all nonmajority party members of either such committee, may request in writing that the Attorney General apply for the appointment of an independent counsel.
  - (2) Report by attorney general pursuant to request. - Not later than 30 days after the receipt of a request under paragraph (1), the Attorney General shall submit, to the committee making the request, or to the committee on which the persons making the request serve, a report on whether the Attorney General has begun or will begin a preliminary investigation under this chapter of the matters with respect to which the request is made, in accordance with subsection (a) or (c) of section 591, as the case may be. The report shall set forth the reasons for the Attorney General's decision regarding such preliminary investigation as it relates to each of the matters with respect to which the congressional request is made. If there is such a preliminary investigation, the report shall include the date on

which the preliminary investigation began or will begin.

- (3) Submission of information in response to congressional request. - At the same time as any notification, application, or any other document, material, or memorandum is supplied to the division of the court pursuant to this section with respect to a preliminary investigation of any matter with respect to which a request is made under paragraph (1), such notification, application, or other document, material, or memorandum shall be supplied to the committee making the request, or to the committee on which the persons making the request serve. If no application for the appointment of an independent counsel is made to the division of the court under this section pursuant to such a preliminary investigation, the Attorney General shall submit a report to that committee stating the reasons why such application was not made, addressing each matter with respect to which the congressional request was made.

- (4) Disclosure of information. - Any report, notification, application, or other document, material, or memorandum supplied to a committee under this subsection shall not be revealed to any third party, except that the committee may, either on its own initiative or upon the request of the Attorney General, make public such portion or portions of such report, notification, application, document, material, or memorandum as will not in the committee's judgment prejudice the rights of any individual.

Sec. 593. Duties of the division of the court

- (a) Reference to Division of the Court. - The division of the court to which this chapter refers is the division established under section 49 of this title.

- (b) Appointment and Jurisdiction of Independent Counsel. -

  - (1) Authority. - Upon receipt of an application under section 592(c), the division of the court shall appoint an appropriate independent counsel and shall define that independent counsel's prosecutorial jurisdiction.

  - (2) Qualifications of independent counsel. - The division of the court shall appoint as independent counsel an individual who has appropriate experience and who will conduct the investigation and any prosecution in a prompt, responsible, and cost-effective manner. The division of the court shall seek to appoint as independent counsel an individual who will serve to the extent necessary to complete the investigation and any prosecution without undue delay. The division of the court may not appoint as an independent counsel any person who holds any office of profit or trust under the United States.

  - (3) Scope of prosecutorial jurisdiction. - In defining the independent counsel's prosecutorial jurisdiction, the division of the court shall assure that the independent counsel has adequate authority to fully investigate and prosecute the subject matter with respect to which the Attorney General has requested the appointment of the independent counsel, and all matters related to that subject matter. Such jurisdiction shall also include the authority to investigate and prosecute Federal crimes, other than those classified as Class B or C misdemeanors or infractions, that may arise out of the investigation or prosecution of the matter with respect to which the Attorney General's request was made, including perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses.

- (4) Disclosure of identity and prosecutorial jurisdiction. - An independent counsel's identity and prosecutorial jurisdiction (including any expansion under subsection (c)) may not be made public except upon the request of the Attorney General or upon a determination of the division of the court that disclosure of the identity and prosecutorial jurisdiction of such independent counsel would be in the best interests of justice. In any event, the identity and prosecutorial jurisdiction of such independent counsel shall be made public when any indictment is returned, or any criminal information is filed, pursuant to the independent counsel's investigation.

- (c) Expansion of Jurisdiction. -

  - (1) In general. - The division of the court, upon the request of the Attorney General, may expand the prosecutorial jurisdiction of an independent counsel, and such expansion may be in lieu of the appointment of another independent counsel.

  - (2) Procedure for request by independent counsel. - (A) If the independent counsel discovers or receives information about possible violations of criminal law by persons as provided in section 591, which are not covered by the prosecutorial jurisdiction of the independent counsel, the independent counsel may submit such information to the Attorney General. The Attorney General shall then conduct a preliminary investigation of the information in accordance with the provisions of section 592, except that such preliminary investigation shall not exceed 30 days from the date such information is received. In making the determinations required by section 592, the Attorney General shall give great weight to any recommendations of the independent counsel.

- (B) If the Attorney General determines, after according great weight to the recommendations of the independent counsel, that there are no reasonable grounds to believe that further investigation is warranted, the Attorney General shall promptly so notify the division of the court and the division of the court shall have no power to expand the jurisdiction of the independent counsel or to appoint another independent counsel with respect to the matters involved.

- (C) If -

    - (i) the Attorney General determines that there are reasonable grounds to believe that further investigation is warranted; or

    - (ii) the 30-day period referred to in subparagraph (A) elapses without a notification to the division of the court that no further investigation is warranted, the division of the court shall expand the jurisdiction of the appropriate independent counsel to include the matters involved
or shall appoint another independent counsel to investigate

such matters.

- (d) Return for Further Explanation. - Upon receipt of a notification under section 592 or subsection (c)(2)(B) of this section from the Attorney General that there are no reasonable grounds to believe that further investigation is warranted with respect to information received under this chapter, the division of the court shall have no authority to overrule this determination but may return the matter to the Attorney General for further explanation of the reasons for such determination.

- (e) Vacancies. - If a vacancy in office arises by reason of the resignation, death, or removal of an independent counsel, the division of the court shall appoint an independent counsel to complete the work of the independent counsel whose resignation, death, or removal caused the vacancy, except that in the case of a vacancy arising by reason of the removal of an independent counsel, the division of the court may appoint an acting independent counsel to serve until any judicial review of such removal is completed.

- (f) Attorneys' Fees. -

    - (1) Award of fees. - Upon the request of an individual who is the subject of an investigation conducted by an independent counsel pursuant to this chapter, the division of the court may, if no indictment is brought against such individual pursuant to that investigation, award reimbursement for those reasonable attorneys' fees incurred by that individual during that investigation which would not have been incurred but for the requirements of this chapter. The division of the court shall notify the independent counsel who conducted the investigation and Attorney General of any request for attorneys' fees under this subsection.

- (2) Evaluation of fees. - The division of the court shall direct such independent counsel and the Attorney General to file a written evaluation of any request for attorneys' fees under this subsection, addressing -
    - (A) the sufficiency of the documentation;
    - (B) the need or justification for the underlying item;
    - (C) whether the underlying item would have been incurred but for the requirements of this chapter; and

      (D) the reasonableness of the amount of money requested.
- (g) Disclosure of Information. - The division of the court may, subject to section 594(h)(2), allow the disclosure of any notification, application, or any other document, material, or memorandum supplied to the division of the court under this chapter.
- (h) Amicus Curiae Briefs. - When presented with significant legal issues, the division of the court may disclose sufficient information about the issues to permit the filing of timely amicus curiae briefs.

28 USC § 594.

Authority and duties of an independent counsel

- (a) Authorities. - Notwithstanding any other provision of law, an independent counsel appointed under this chapter shall have, with respect to all matters in such independent counsel's prosecutorial jurisdiction established under this chapter, full power and independent authority to exercise all investigative and prosecutorial functions and powers of the Department of Justice, the Attorney General, and any other officer or employee of the Department of Justice, except that the Attorney General shall exercise direction or control as to those matters that specifically require the Attorney General's personal action under section 2516 of title 18. Such investigative and prosecutorial functions and powers shall include -

- (1) conducting proceedings before grand juries and other investigations;
- (2) participating in court proceedings and engaging in any litigation, including civil and criminal matters, that such independent counsel considers necessary;
- (3) appealing any decision of a court in any case or proceeding in which such independent counsel participates in an official capacity;
- (4) reviewing all documentary evidence available from any source;
- (5) determining whether to contest the assertion of any testimonial privilege;
- (6) receiving appropriate national security clearances and, if necessary, contesting in court (including, where appropriate, participating in in camera proceedings) any claim of privilege or attempt to withhold evidence on grounds of national security;
- (7) making applications to any Federal court for a grant of immunity to any witness, consistent with applicable statutory requirements, or for warrants,

subpoenas, or other court orders, and, for purposes of sections 6003, 6004, and 6005 of title 18, exercising the authority vested in a United States attorney or the Attorney General;

- (8) inspecting, obtaining, or using the original or a copy of any tax return, in accordance with the applicable statutes and regulations, and, for purposes of section 6103 of the Internal Revenue Code of 1986 and the regulations issued thereunder, exercising the powers vested in a United States attorney or the Attorney General;

- (9) initiating and conducting prosecutions in any court of competent jurisdiction, framing and signing indictments, filing informations, and handling all aspects of any case, in the name of the United States; and (10) consulting with the United States attorney for the district in which any violation of law with respect to which the independent counsel is appointed was alleged to have occurred.

TITLE 28--JUDICIAL ADMINISTRATION CHAPTER VI--OFFICES OF INDEPENDENT COUNSEL, DEPARTMENT OF JUSTICE PART 603--JURISDICTION OF THE INDEPENDENT COUNSEL: IN RE MADISON GUARANTY SAVINGS & LOAN ASSOCIATION--Table of Contents Sec. 603.1 Jurisdiction of the Independent Counsel (a) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate to the maximum extent authorized by part 600 of this chapter whether any individuals or entities have committed a violation of any federal criminal or civil law relating in any way to President William Jefferson Clinton's or Mrs. Hillary Rodham Clinton's relationships with: (1) Madison Guaranty Savings & Loan Association; (2) Whitewater Development Corporation; or (3) Capital Management Services. (b) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate other allegations or evidence of violation of any federal criminal or civil law by any person or entity developed during the Independent Counsel's investigation referred to above, and connected with or arising out of that investigation. (c) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to investigate any violation of section 1826 of title 28 of the U.S. Code, or any obstruction of the due administration of justice, or any material false testimony or statement in violation of federal law, in connection with any investigation of the matters described in paragraph (a) or (b) of this section. (d) The Independent Counsel: In re Madison Guaranty Savings & Loan Association shall have jurisdiction and authority to seek indictments and to prosecute, or to bring civil actions against, any persons or entities involved in any of the matters referred to in paragraph (a), (b), or (c) of this section who are reasonably believed to have committed a violation of any federal criminal or civil law arising out of such matters, including persons or entities who have engaged in an unlawful conspiracy or who have aided or abetted any federal offense. [59 FR 5322, Feb. 4, 1994] [[Page 597]]